

Supreme Court of the United States

OCTOBER TERM, 1969

No. 729

DONALD BACHELLAR, ET AL.,

Petitioners,

—v.—

MARYLAND,

Respondent.

ON WRIT OF CERTIORARI
TO THE COURT OF SPECIAL APPEALS OF MARYLAND

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IN THE CRIMINAL COURT OF BALTIMORE

STATE OF MARYLAND

vs.

DONALD CARTWRIGHT BACHELLER

* * * *

Magistrate's Appeal Docket of 1966.

January Term.

Number 456.

Charge:—Disorderly Conduct.

Appearance of Fred E. Weisgal, filed.

April 19, 1966	Commitment.
April 19, 1966	Disposition: Guilty, 60 days in Baltimore City Jail, and fine \$50.00 and costs committed. I. Sewell Lamdin, M.C.J.
April 22, 1966	Filed in Criminal Court.
June 6, 1966	Motion to Dismiss filed.
June 8, 1966	Plea: Not Guilty and Issue before Sworn Jury. Prendergast, Judge.
June 8, 1966	Defendant's Questions on Voir Dire filed.
June 8, 1966	Not concluded; and resumed on 9, June, 1966.
June 9, 1966	Not concluded; and resumed on 10, June, 1966.
June 10, 1966	Motion for Judgment of Acquittal filed and denied. Prendergast, Judge.
June 10, 1966	Not concluded and resumed on 13, June, 1966.

- June 13, 1966 Defendant's Request for Instructions to Jury filed.
- June 13, 1966 Verdict: Guilty.
- June 13, 1966 Judgment: Sixty (60) days in Baltimore City Jail from 13, June, 1969, and fined \$50.00 and costs, consecutive.
- June 14, 1966 Committed to Baltimore City Jail; failed to pay fine and costs.
- June 14, 1966 An Appeal to the Court of Appeals of Maryland filed.
- June 15, 1966 Supplement to Appeal to the Court of Appeals of Maryland filed.
- June 16, 1966 Take Bail in amount of \$500.00 pending disposition. Prendergast, Judge.
- June 16, 1966 Recognizance taken by Samuel London in amount of \$500.00.
- June 16, 1966 Order of Court extending time for filing Transcript to and including September 5, 1966, filed. Predergast, Judge.
- September 5, 1966 Order of Court extending time for filing Transcript to Sept. 10, 1966, filed. Carter, Judge.
- September 7, 1966 Transcript of Testimony filed. Transcript No. 2861.
- November 1, 1966 Petition to prosecute an Appeal as an Indigent Defendant together with oath in forma pauperis filed.
- November 25, 1966 Hearing on Defendant's Petition to proceed as an Indigent before Cardin, Judge. (Sub Curia).
- December 21, 1966 Order of Court denying Petition of Defendant to proceed as an Indigent filed. Cardin, Judge.
- December 29, 1966 An Appeal to the Court of Appeals of Maryland from denial of defendant's Motion to proceed as an Indigent filed.

- January 20, 1967 An Appeal to the Court of Special Appeals of Maryland from Order denying defendant's Motion to proceed as an Indigent filed.
- January 20, 1967 Transcript relative to question of in-Order of Court extending time for filing digency to March 1, 1967, filed. Cardin, Judge.
- January 23, 1967 Petition to Appeal as an Indigent Defendant filed, heard and denied. Cardin, Judge.
- January 26, 1967 An Appeal to the Court of Special Appeals of Maryland from denial of Petition to Appeal as an Indigent Defendant filed.
- February 21, 1967 Transcript of Testimony filed. Transcript No. 2862.
- February 24, 1967 Transcript of Record on Appeal as to question of indigency transmitted under seal to the Court of Special Appeals of Maryland and certified copy of Transcript of Record transmitted under seal to Francis B. Burch, Attorney General of Maryland.
- March 22, 1967 Mandate: Court of Special Appeals of Maryland, Misc. No. 1, Initial Term, 1967.
Donald C. Bacheller vs. State of Maryland.
Appeal from the Criminal Court of Baltimore.
Filed: February 28, 1967.
January 27, 1967: Petition to proceed in forma pauperis.
February 28, 1967: Respondent's Answer.

March 22, 1967

February 28, 1967: Joint Petition to waive printing briefs, etc.

February 28, 1967: Agreed Stipulation as to facts.

February 28, 1967: Waiver of Oral Argument.

March 15, 1967: Order of appointment of counsel.

March 16, 1967: Order as to procedure on Appeal.

March 21, 1967: Judgment reversed and Per Curiam filed. Judgment reversed, and case remanded for entry of an Order permitting the Appellant's to proceed as indigents in conformity with this opinion.

March 27, 1967

Order of Court permitting appellant to proceed as an Indigent and authorizing the payment of Record on Appeal by the State of Maryland filed. Cardin, J.

STATE OF MARYLAND, CITY OF BALTIMORE, To
Wit:

I HEREBY CERTIFY, that the foregoing is a true copy of the Docket Entries in the aforesaid Case, taken and copied from the Record of Proceedings of the Criminal Court of Baltimore.

IN TESTIMONY WHEREOF, I hereto set my hand and affix the seal of the Criminal Court of Baltimore, this 3rd day of April, A. D., 1967.

/s/ Lawrence R. Mooney
Clerk of the Criminal Court
of Baltimore

[SEAL]

COMMITMENT TO

- ☒ Baltimore City Jail, or
☐ Maryland House of Correction, or
☐ The Maryland Correctional Institution — Hagerstown
☐ The Maryland Correctional Institution for Women — Jessup

State of Maryland

vs.

Donald Cartwright Bacheller

: IN THE MUNICIPAL COURT OF
 : BALTIMORE CITY, CRIMINAL DIVISION,
 : PART
 : Northern
 : Arrest Register Number 64861

STATE OF MARYLAND, CITY OF BALTIMORE, to wit:

☒ Warden of the Baltimore City Jail
 TO THE ☐ Warden of the Maryland House of Correction
☐ The Maryland Correctional Institution — Hagerstown
☐ The Maryland Correctional Institution for Women — Jessup

WHEREAS Donald Cartwright Bacheller hereinafter called the Traverser, after having been informed by me of his right to have a trial by jury on the charge hereinafter mentioned, preferred against the said Traverser on the oath of Sgt. Joseph DiCarlo and having thereupon declared that he wished to waive his said right to a trial by jury, and abide by the determination of said charge by me, was thereupon on the 19th day of April, 1966 duly tried before the undersigned, a Judge of the Municipal Court of Baltimore City, Criminal Division, presiding in the Northern Part of the said Court, in the State of Maryland, upon the charge of, and was thereupon on said trial found guilty of the offense of unlawfully acting in a disorderly manner to the disturbance of the public peace on a public street, to-wit: 3300 Block of Greenmount Avenue, on or about the 28th day of March, 1966, in Baltimore City in the State of Maryland, and it was thereupon adjudged that the said Traverser for the said offense should:

☐ A. IN DEFAULT OF FINE☐ PAY A FINE of

Dollars and ----- Dollars and ----- Cents costs and it was FURTHER ADJUDGED that if the said sums should not be paid the said Traverser should be imprisoned in the BALTIMORE CITY JAIL until such payment be made or until the said Traverser should be discharged in due course of law.

☒ B. IN EXECUTION OF SENTENCE AND DEFAULT OF FINE

☒ BE IMPRISONED in the BALTIMORE CITY JAIL for a period of Sixty (60) days and IN ADDITION thereto pay a fine of \$50.00 Dollars, and \$4.00 Cents Costs,

with the imprisonment herein; and it was FURTHER ADJUDGED that if the said sum should not be paid forthwith, the said Traverser should be imprisoned in the Baltimore City Jail, until such payment be made or until the said Traverser be discharged by due course of law. AND WHEREAS the said Traverser has not paid the said fine and costs or any part thereof imposed as aforesaid but therein has made default.

NOW THEREFORE, you are hereby commanded to receive from any officer the body of the said Traverser and safely keep him in your Jail and custody until the said Traverser shall be thence delivered according to law.

☐ C. IN EXECUTION OF SENTENCE☐ BE IMPRISONED

☐ In the BALTIMORE CITY JAIL
☐ In the MARYLAND HOUSE OF CORRECTION

for a period of

☐ D. IN EXECUTION OF INDETERMINATE SENTENCE☐ BE IMPRISONED

☐ The Maryland Correctional Institution — Hagerstown
☐ The Maryland Correctional Institution for Women — Jessup

for an indeterminate period not to exceed ----- from the date hereof

NOW THEREFORE, you, are hereby commanded to receive from any officer the body of said Traverser and safely keep him in your Institution until the said Traverser shall be thence delivered according to law.

☐ E. The sentence imposed in Section ----- aforesaid shall run (a) CONCURRENTLY or (b) CONSECUTIVELY with the sentence imposed in case in Arrest Register No.

Given under my hand and seal this 19th Day of April 1966

TRUE COPY, TEST

Edward S. Starkloff
 from the Court Clerk

Edward S. Starkloff, Chief Clerk
 MUNICIPAL COURT OF BALTIMORE CITY

Prepared by

1 — M. C. B. C.

Court Clerk

I, Sewell Landin (Seal)
 Judge of the Municipal Court of Baltimore City
 presiding in Criminal Division, N Part

POSTED TO COSTS RECORD
 Date 2/21/67 By A.R.
 Page 303

Fees & Costs

Fine	<u>5000</u>
States Attorney	<u>500</u>
Clerk	<u>780</u>
Sheriff	<u>1600</u>
Attorney	<u>500</u>
Total	<u>8380</u>

#12494

JUN 16 1966 - Take bail in

The State recommends that bail in the amount of Five Hundred (\$500.00) dollars be accepted in this case pending disposition of the appeal from the judgment of the Criminal Court of Baltimore heretofore entered.

George J. Helinski
 George J. Helinski
 Deputy State's Atty.

APPROVED

J.M.
 Judge

Samuel London
3500 Antioch Farms Rd
816 Shuter St 740

JUN 16 1966

500.00

No. 1540 No. 1966

STATE
 VS.

Bail

Name Donald Cartwright Bacheller, M/W/19

Address 2737 St. Paul Street

Charge Disorderly Conduct

6/9/66 - Not concluded

6/10/66 - Not concluded

Offense Report No. _____

WITNESS

Lt. James DiPino, Northern

Sgt. Joseph DiCarlo, "

" Arnold Bedsworth, "

Off. James Welsh, "

" Leonard Stem "

A JUN 8 1966

N 6 T J

JUN 13 1966

G S

60 DAYS & C. F. E.

TO OK & FINE

500.00 COSTS.

FEENDERGAST, J

APR 22 1966

Filed

19

APPEAL

Mr. Clerk:

Please enter an appeal to the Criminal Court of Baltimore City on behalf of Donald Bachellar who was fined \$50.00 and costs and sentenced to Sixty (60) days in Jail for disorderly conduct.

/s/ Fred E. Weisgal
FRED E. WEISGAL

APPEAL NOTED this 19th day of April 1966, 10:00
A.M.

/s/ Edward S. Starkloff
EDWARD S. STARKLOFF
Chief Clerk
Municipal Court of Baltimore
City

IN THE CRIMINAL COURT OF BALTIMORE CITY

Appeal No. 456-462

STATE OF MARYLAND

v.

DONALD BACHELLAR, ET AL.

MOTION TO DISMISS

Come now defendants by their attorney, Fred E. Weisgal, Esq., and respectfully move the Court to dismiss the prosecution against them; and as reason therefor state as follows:

1. That they are charged with violation of Article 27, § 123 of the Annotated Code of Maryland, defining the offense of disorderly conduct;

2. That Article 27, § 123, on its face and as construed by the Court of Appeals of Maryland,

a. Abridges defendants' rights of free speech, expression, petition and assembly guaranteed by the Constitution of the State of Maryland and by the First and Fourteenth Amendments to the Constitution of the United States; and

b. Is vague, indefinite and overbroad, and thereby denies defendants' rights to due process of law and the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States;

3. That this motion is supported by the following authorities:

Edwards v. South Carolina, 372 U.S. 229 (1963)

Henry v. City of Rock Hill, 376 U.S. 776 (1963)

Cox v. Louisiana, 379 U.S. 536 (1965)

Shuttlesworth v. City of Birmingham, 382 U.S. 87 (1965)

Ashton v. Kentucky, 34 U.S.L. WEEK 4398 (U.S., May 16, 1966)

Respectfully submitted,

/s/ Fred E. Weisgal
FRED E. WEISGAL
111 North Charles Street
Baltimore, Maryland

Counsel for defendants

IN THE CRIMINAL COURT OF BALTIMORE CITY

Appeal No. ———

STATE OF MARYLAND

v.

DONALD BACHELLAR, ET AL.

MOTION FOR JUDGMENT OF ACQUITTAL OR
FOR DISMISSAL ON THE EVIDENCE

Come now defendants by their attorney, Fred E. Weisgal, Esq., and respectfully move this Court to enter a judgment of acquittal, or in the alternative a judgment dismissing the prosecution against them; and as reason therefor state as follows:

1. That they are charged with violation of Article 27, § 123 of the Annotated Code of Maryland, defining the offense of disorderly conduct;

2. That the evidence herein shows that this charge arises exclusively out of conduct by the defendants protesting American involvement in the war in Viet Nam and seeking to persuade others by peaceful means lawfully to oppose American involvement in the war in Viet Nam;

3. That the evidence is insufficient to enable a reasonable juror to conclude beyond a reasonable doubt that any of these defendants are guilty of the offense defined by Article 27, § 123;

4. That there is no evidence whatever that any of these defendants are guilty of the offense defined by Article 27, § 123; and that their conviction without evidence on this record would deny them the due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States, *Thompson v. City of Louisville*, 362 U.S. 199 (1960);

5. That Article 27, § 123, on its face and as construed by the Court of Appeals of Maryland, and as applied to these defendants on the facts of record in this cause,

a. Abridges defendants' rights of free speech, expression, petition and assembly guaranteed by the Constitution of the State of Maryland and by the First and Fourteenth Amendments to the Constitution of the United States; and

b. Is vague, indefinite and overbroad, and thereby denies defendants' rights to due process of law and equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

In support of paragraphs 5(a) and 5(b) of this motion, defendants specifically state that on its face, as construed, and as applied to these defendants on the facts herein, Article 27, § 123:

i. Fails to give fair warning of the nature of the conduct which it prohibits, *Lanzetta v. New Jersey*, 306 U.S. 451 (1939);

ii. Purports to punish indiscriminately conduct protected by the freedoms of expression of the First and Fourteenth Amendments and conduct not so protected; and by requiring persons exercising those freedoms to guess the line of constitutional protection at their peril, deters the exercise of federally guaranteed free expression, *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Cox v. Louisiana*, 379 U.S. 536 (1965);

iii. Would, if applied in this case, punish conduct of the defendants immunized against any state prohibition or punishment by the First and Fourteenth Amendments, *Edwards v. South Carolina*, *supra*; *Henry v. City of Rock Hill*, 376 U.S. 776 (1963);

iv. Purports to make conduct criminal on the sole ground that it is disturbing or disquieting to others, and thus punishes persons for the expression of views merely because other persons may find those views offensive or disturbing, *Terminiello v. Chicago*, 337 U.S. 1 (1949); *Henry v. City of Rock Hill*, *supra*; *Ashton v. Kentucky*, 34 U.S.L. WEEK 4398 (U.S., May 16, 1966).

v. Would, if applied in this case, punish the defendants on the sole ground that their views con-

cerning American involvement in the war in Viet Nam were offensive or disturbing or disagreeable to other persons, *ibid.*;

vi. Purports to make criminal mere refusal to comply with a police order, without requiring that the order be reasonable, and thus subjects the liberty of persons in public places to the arbitrary will of the police, *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965);

vii. Would, if applied in this case, punish the defendants solely for refusal to comply with a police order which was

(A) unreasonable and arbitrary;

(B) unconstitutional, because it required the defendants to desist from conduct protected by the First and Fourteenth Amendments; and

(C) unconstitutional, because it required the defendants to desist from lawful activity on no other ground than that such activity aroused hostility and ideological opposition in other persons, *Wright v. Georgia*, 373 U.S. 284 (1963);

viii. Is so general in its definition of the offense created by it, that it fails generally and will fail in this case to guide and restrict the jury in its application; and that it therefore allows the jury to convict defendants and these defendants in particular arbitrarily and discriminatorily, and by reason of the jury's distaste for defendants' ideology, and on the basis of conduct protected by the First and Fourteenth Amendments, *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963).

Respectfully submitted,

/s/ Fred E. Weisgal
FRED E. WEISGAL
111 North Charles Street
Baltimore, Maryland
Counsel for defendants

Argued—Overruled. 10 June 66 /s/ J.G.P.

IN THE CRIMINAL COURT OF BALTIMORE CITY

Appeal No. ———

STATE OF MARYLAND

v.

DONALD BACHELLAR, ET AL.

DEFENDANTS' REQUESTS FOR INSTRUCTIONS

Defendants by their attorney, Fred E. Weisgal, Esq., respectfully request the Court to charge the jury as follows:

INSTRUCTION I.

You may not convict these defendants of disorderly conduct unless you find beyond a reasonable doubt that they refused to obey a reasonable and lawful police order, clearly communicated to them.

INSTRUCTION II.

For these purposes, a police order to move along or to disperse is reasonable and lawful only if it is made to prevent an imminent public disturbance, and if it is reasonably necessary in order to prevent such a disturbance. If you have a reasonable doubt that in this case the police ordered the defendants to move along; or if you have a reasonable doubt that any such order issued by the police to the defendants was made to prevent an imminent public disturbance; or if you have a reasonable doubt that any such order was reasonably necessary to prevent this kind of disturbance you may not convict these defendants.

INSTRUCTION III.

Now, when I speak of a "public disturbance," I do not mean simply anger or hostility or any feeling of this sort on the part of the public, nor do I mean merely an episode of shouting or singing or name-calling not calculated to spill over into imminent violence. When I speak of a "public disturbance," I mean physical violence, or the attempt to use physical violence, by one person against another.

INSTRUCTION IV.

And I should make one other point clear. Even if you find that these defendants refused to obey a police order which was reasonably necessary to prevent a public disturbance, you may not convict the defendants if they were doing only what they had a right to do. That is, there are certain activities, certain things which in this free country all citizens have a right to do, even though they may anger or irritate others. If a citizen does only these things, and nothing more, a policeman may not order him to stop doing them merely because these things anger others and make others want to resort to violence. In such a case it is the obligation of the police to protect the citizen from violence by others, and they may not tell him to stop doing what he is doing, or to move along or go away merely because of threats of violence by others.

ALTERNATIVE INSTRUCTION IV-A.

[Defendants request that the Court give instruction IV as set out above. If instruction IV is given, instruction IV-A should no be given. However, if this Court should rule that instruction IV is not proper to be given, the defendants, while respectfully reserving an exception to such ruling, request that the Court at the least give Instruction IV-A, as follows:]

And I should make one other point clear. Even if you find that these defendants refused to obey a police order which was reasonably necessary to prevent a public disturbance, you may not convict the defendants if they were doing only what they had a right to do. That is, there are certain activities, certain things which in this free country all citizens have a right to do, even though they may anger or irritate others. If a citizen does only these things, and nothing more, a policeman may not order him to stop doing them merely because these things anger others and make others want to resort to violence. In such a case it is the obligation of the police to protect the citizen from violence by others if this is at all practicable, and they may not tell him to stop doing what he is doing, or to move along or go away merely because of

threats of violence by others, unless the police reasonably believe that it is impossible to prevent violence from occurring by restraining only those persons who are threatening violence. In such a case, the police are obligated first to attempt to quell the danger of violence by telling those persons who are threatening violence to move along or disperse, and by restraining or arresting them if necessary and if practicable, before they may order persons to stop doing acts which are themselves peaceful and which threaten to lead to a disturbance only because they anger others.

INSTRUCTION V.

Under no circumstances may you convict these defendants if the only conduct of theirs which was likely to lead to an imminent public disturbance was the expression of views or ideas which other people did not like or resented, or which stirred other people to anger or violence. The defendants may be convicted only if their conduct, or their manner of expressing their ideas was offensive and likely to lead to a public disturbance, and not if it was the ideas themselves that they were expressing or supporting, which were likely to create a public disturbance. Where conduct—in this case the physical acts of the defendants—is likely to lead to imminent public disturbance, the police may order it stopped, and the refusal to obey such an order is disorderly conduct. But where the danger of imminent public disturbance created by an individual arises from the ideas or the views or beliefs which he expresses, he may not be required to stop and is not guilty of disorderly conduct for refusing to obey a police order to stop expressing his views.

INSTRUCTION VI.

Specifically, I charge you that if the only threat of public disturbance arising from the actions of these defendants was a threat that arose from the anger of others who were made angry by their disagreement with the defendants' expressed views concerning Viet Nam, or American involvement in Viet Nam, you must acquit

these defendants. And if you have a reasonable doubt whether the anger of those other persons was occasioned by their disagreement with defendants' views on Viet Nam, rather than by the conduct of the defendants in sitting or staying on the street, you must acquit these defendants.

INSTRUCTION VII.

The defendants at all times had a legally protected right to set forth their political views, beliefs or ideology even if the result was to induce a condition of unrest, create dissatisfaction in others, invite dispute, or even stir people to anger at their views. If they did nothing more to create a public disturbance than to exercise this right, the police could not lawfully order them to move along or go away, and they are not guilty of disorderly conduct for disobeying such a police order.

ALTERNATIVE INSTRUCTION I-A.

[Defendants request that the Court give instructions I to VII as set out above. If these instructions are given, none of the following instructions should be given. However, if this Court should rule that instruction I is not proper to be given, the defendants, while respectfully reserving an exception to such ruling, request that the Court at the least give instruction I-A, as follows:]

You may not convict these defendants of disorderly conduct unless you find beyond a reasonable doubt that they either (1) refused to obey a reasonable and lawful police order, clearly communicated to them; or (2) knowingly and purposely engaged in acts which they had no lawful right to do, and which were calculated and likely in themselves to lead to an imminent public disturbance; or (3) knowingly and purposely engaged in acts which they had no lawful right to do, and which obstructed or hindered pedestrians or traffic.

[If instruction I-A is given, the following instructions should also be given:

Instruction II, *supra*, without amendment.

Instruction III, *supra*, without amendment.

Instruction IV [or IV-A] with these amendments:

(1) After the words "if you find that these defendants" in the second sentence, add: "knowingly engaged in acts which were likely to lead to an imminent public disturbance, or that they"; and

(2) Change the period at the end of the fourth sentence to a semi-colon, and add thereafter: "nor may a citizen be convicted of disorderly conduct for doing these things".

Instruction V with these amendments:

(1) After the word "disturbance," in the third sentence, add: "that conduct is disorderly conduct; also"; and

(2) After the words "disorderly conduct" in the last sentence, add: "for expressing those views or".

Instruction VI, *supra*, without amendment.

Instruction VII with this amendment: after the words "exercise this right" in the second sentence, add: "they are not guilty of disorderly conduct;".

An Instruction VIII, as follows:

INSTRUCTION VIII

Now, I have said that you may convict the defendants of disorderly conduct if they knowingly and purposely engaged in acts which they had no lawful right to do, and which obstructed and hindered pedestrians or traffic. Of course, no one has a lawful right to sit or lie on a sidewalk so as to obstruct or hinder pedestrians or traffic. But you may not convict the defendants of disorderly conduct even if you find they sat or lay on the sidewalk unless you find two further things. First, you must find that they knowingly and purposely sat there at a time when they were permitted to get up and go away by the police, and when they knew that they were permitted to get up and go away. You may not convict them if you find that they were thrown involuntarily onto the sidewalk and not permitted to rise by the police; or if you find that they were thrown involuntarily onto the sidewalk and—while sitting or lying there—they be-

lieved that the police wanted them to stay there or would not want them to or let them get up. Second, you must find that by sitting or lying on the sidewalk they actually obstructed or hindered pedestrians or traffic. You may not convict the defendants, even if they knowingly and purposely sat or lay on the sidewalk, if the sidewalk at that time and place could not be used or crossed over by pedestrians by reason of the pickets or any police who were watching the pickets, or any crowd which was gathered to watch the pickets. If these defendants themselves were obstructing the passage of pedestrians on the sidewalk, or if police or a crowd who were attracted by these defendants' sitting on the sidewalk or lying on the sidewalk were obstructing the passage of pedestrians, then these defendants would be guilty. But if the pickets or police or crowd were obstructing the sidewalk when the defendants came out onto the sidewalk, and the defendants then sat there during a time when the sidewalk could not be used by pedestrians because of these prior obstructions, the defendants would not be guilty of disorderly conduct simply for sitting or lying on the sidewalk.

Respectfully submitted,

/s/ Fred E. Weisgal
 FRED E. WEISGAL
 111 North Charles Street
 Baltimore, Maryland
 Counsel for defendants

INSTRUCTION

The Jury is instructed that as a matter of law the behavior of the Defendants while in the U.S. Recruiting Office did not constitute disorderly conduct.

All requested instructions refused. Covered in changes considered proper.

/s/ J.G.P.
 13 June 1966

[fol. 2]

IN THE CRIMINAL COURT OF BALTIMORE

PART 3

Appeals #456 through 462/66

STATE OF MARYLAND

—vs.—

DONALD L. BACHELLER, ALLAN B. GREEN,
WAYNE L. HEIMBACH, DANIEL KLEIN,
DANIEL RUDIMAN, DAVID HARDING

June 8, 1966

Before Hon. J. Gilbert Prendergast and a Jury

Appearances:

Allan B. Lipson, Esq., Malcom Kitt, Esq., On behalf
of the State.

Fred Weisgal, Esq., On behalf of the defendants.

[fol. 3] (FOLLOWING IN CHAMBERS)

THE COURT: The Court expected these cases to be called for trial but was informed rather unexpectedly the motion to dismiss had been filed by defense counsel a day or two ago. The Court has never seen the motion until a xerox copy of it was presented at that point by Mr. Weisgal. The court clerk had no such motion but I understand it was in fact filed with the Clerk of the Criminal Court.

MR. WEISGAL: On Monday, June 6th.

THE COURT: Now there has been some discussion on the motion. I am satisfied that under the authority of *Drue vs. State*, 224 Md. 186, later in 236 Md., 349, as well as in *Harris vs. State* 237 Md. 299, the Court of Appeals of Maryland has upheld the constitutionality of our disorderly conduct statute, found in Section 123 of Article 27. Actually the current version of the statute

is found in Michie Supplemental Volumn 3 of the code. Mr. Weisgal takes the position that the Supreme Court of the United States adopted a different philosophy than [fol. 4] has the Court of Appeals of Maryland. I am by no means satisfied that this is so but as I see my duty I am bound by decisions of the Court of Appeals of Maryland and must follow it. To put it in the alternative or negative form I simply do not have the temerity to overrule the Court of Appeals. Accordingly I must deny the motion to dismiss as to each of the six appeals before me. In the event that there should be a verdict of guilty as to any one or all of the cases, I shall be happy to have Mr. Weisgal file motions for a new trial and the matter may be considered in more detail and heard at greater length at that time. There is of course no automatic exception to the defense counsel to the ruling I just announced.

* * * *

[fol. 11]

(END OF CONFERENCE IN CHAMBERS)

* * * *

[fol. 14] THE CLERK: In Appeal 456 the docket of [fol. 15] 1966, the State charges disorderly conduct. In the appeal you are charged with unlawfully acting in a disorderly manner to the disturbance of the public peace on a public street, to wit 3300 block of Greenmount Avenue, on or about the 28th day of March, 1966, in Baltimore City, State of Maryland. What is your plea to the charge?

MR. WEISGAL: Not guilty, jury trial. In order to save time, your Honor, all six defendants are charged with the same offenses. Can we just possibly read it one more time and call the defendants up here?

* * * *

[fol. 16] THE CLERK: As to each of these defendants, you are familiar with the appeal and it contents, counsel?

MR. WEISGAL: I am.

THE CLERK: And do you waive the reading thereof?

MR. WEISGAL: I waive the reading.

THE CLERK: The pleas as to each?

MR. WEISGAL: Not guilty.

THE CLERK: Court or jury?

MR. WEISGAL: Jury trial.

. . . .

[fol. 24]

(WHEREUPON THE JURY WAS SWORN IN)

. . . .

[fol. 25]

April [sic: June] 9, 1966

. . . .

[fol. 26]

SGT. FIRST CLASS HARRY O. GRUMLEY,

. . . .

[fol. 27]

DIRECT EXAMINATION BY MR. LIPSON:

Q Sgt. Grumley, how long have you been a member of the United States Army?

A Sixteen—

MR. WEISGAL: At this time I think, based on the opening statement made by Mr. Lipson, it would be highly prejudicial and improper for the sergeant to testify. According to Mr. Lipson's testimony—

THE COURT: He didn't testify, he made a statement.

MR. WEISGAL: According to Mr. Lipson's statement, your Honor, he said anything that he described certainly and clearly showed that no disorderly conduct occurred in the recruiting office. Consequently this has no bearing on what took place on the outside once these young men were removed. There is only one issue in front of this court and that is—

THE COURT: You have an objection to make?

MR. WEISGAL: I object to this man being allowed [fol. 28] to testify, your Honor, because it is prejudicial.

THE COURT: Well I think the State is entitled to due process of law. I cannot prejudge what the witness will say. Therefore I must overrule your objection. I have no idea at the moment what the actual testimony will be.

MR. WEISGAL: Very well.

THE COURT: Your objection is overruled.

MR. LIPSON:

Q Sgt. Grumley, how long have you been a member of the U.S. Army?

A Sixteen years and ten months.

Q And what is your present duty station?

A I am U.S. Army recruiter at Greenmount Avenue.

Q That address on Greenmount Avenue?

A 3328.

Q Sergeant, calling your attention to Monday March 28 of 1966, were you on duty that date?

A Yes, sir.

Q Specifically calling your attention to sometime around three p.m., afternoon, were you on duty at that time?

[fol. 29] A Yes, sir.

Q I'd like you to tell his Honor and the ladies and gentlemen of the jury what happened, what if anything unusual happened at that time and place?

* * * *

A At approximately 3:20, I would say give or take five minutes, it started to collect on the outside of the building which would be the corner of Venable and Greenmount Avenue.

Q You say started to collect. What started to collect?

A There was unusual activities in regard to individuals usually that are not there. At this time of course I had been informed of this demonstration which was to be taking place at my installation. Of course when they started to arrive, individuals from the age of six months I suppose to students, why we anticipated this is exactly what was taking place and the demonstration was start-[fol. 30] ing. Outside the installation I didn't observe until they got before the windows which I have approximately a ten foot window. These individuals started to parade with cardboard signs in regard to anti Viet Nam and one thing and another and we were well informed this was beginning.

Q Sergeant, approximately how many people would you estimate were there in the beginning, around 3:20 as you described?

A Well when it got fully underway, I'd say between thirty and forty people. Some of these may have been—

Q Where were these thirty or forty people located at the time?

A The majority of them was directly in front of the office walking in a circle, on the sidewalk.

Q What else if anything happened on the sidewalk after that?

A Approximately 3:30 three individuals, I'll say three, may have been more, quite a few people were present around in the office at this time approached me within the office and their request was if I would display these anti Viet Nam posters in regard—which I couldn't do if I [fol. 31] wanted to—there's regulations for such a display and I wouldn't have done it in the first place and I declined to display these.

Q Sergeant, do you know who made the request of you?

A Yes, sir. This gentleman on the end here.

* * * *

MR. LIPSON: For the record the witness has identified Mr. Harding, one of the defendants as the person who approached him. Now how many people were in there at that time, sergeant?

A Well, as I said, within a particular group that approached me with regard to the posters at that time I'm sure of three.

[fol. 32] Q Can you identify any of those individuals that were in the office at that time

A I believe so.

Q If you see them, point to them.

A The one on the end was one. The one sitting next to him was the second one and I'm pretty sure that the fourth one from the end was also included in the group at that time.

MR. LIPSON: For the record the witness has identified three of the defendants in the case that he recognizes as being in the place at that time.

Q What happened then, sergeant, anytime after 3:25?

A Well when I declined to put up the posters they claimed they were going to stay there until I would put up the posters. I asked them if they would leave. I informed them it was a recruiting station. My mission there was to give out informaton to individuals seeking to enlist in the U.S. Army or to accept applications for the U.S. Army and it was not a place to sit and discuss private affairs and I asked them if they would leave. At that time they declined and said they were going to stay [fol. 33] with the establishment until the posters were displayed.

Q What time was this sergeant?

A This is approximately 3:30, 3:35.

Q Now what happened after that?

A Well of course at this particular time, Mr. Udoff was the U.S. Marshall for the State of Maryland, was present in the office and we informed them it was federal property that these people were sitting on because it was leased. Let's see—we were in some hassle or discussion as to regards which time I should close the office. On the front door it is listed from 8:30 in the morning until five in the afternoon. I had previous commitments for that evening at the Civic Center with Career Opportunities and at the same time with Barry Sadler. My desire was to close early to allow me time to freshen up and be prepared to appear in public.

Q What time did you in fact close that day?

A We did not start closing the office until five minutes to five in the afternoon.

Q What did you do at that time?

[fol. 34] A I was informed by Mr. Udoff to drop the shades, close the venetian blinds, to cover the front window, turn out the lights and inform the parties within the office that I was closing. At this time they declined.

Q What if anything occurred after that?

A Well then I told them one more time and they still declined. At this time Marshall Udoff informed me he would take the situation from there. He went to the individuals. He informed them who he was. He showed each and every one of them his credentials, told them

he was the U.S. Marshall for the State of Maryland. He asked them to leave one more time. They declined. They were going to stay within the office until the posters were displayed. Therefor he asked them to leave one more time peaceably. He said he had the assistance of deputy marshalls within the office and also Baltimore City Police department to remove them from the premises. Of course the decline was as it had always been and they proceeded to remove the individuals from the office.

* * * *

[fol. 35] MR. WEISGAL: There is no doubt that all six of them went into the office and we are not contesting the fact. If you want that stipulation, you have it.

MR. LIPSON: Right. For the record then—

THE COURT: It is stipulated then that all six of the defendants had gone into the recruiting station at Greenmount Avenue. Anything else that they were the [fol. 36] ones involved in the sergeant's testimony or is that not stipulated to?

MR. WEISGAL: It's not stipulated.

THE COURT: They were there at the time of these events. Is that stipulated to?

MR. WEISGAL: It is stipulated that six of them went into the office, your Honor. I'm not stipulating that all six of them were thrown out of the office. I'm just saying all of them left.

THE COURT: I think you made it clear.

* * * *

[fol. 38] FRANK UDOFF,

* * * *

DIRECT EXAMINATION BY MR. LIPSON:

Q Mr. Udooff, were you serving in your official capacity as a United States Marshall on Monday March 28, 1966?

A Yes, I did.

[fol. 39] Q In this capacity did you have occasion to go sometime in the afternoon to 3328 Greenmount Avenue, United States Army recruiting office?

A I did.

Q What was the nature of your visit there?

A The nature of my visit to that area was the instructions from the United States Attorney for the District of Maryland to go and observe.

Q Did you in fact go and observe?

A Yes, I did.

Q What if anything did you observe, Mr. Udoff?

A Well inside the premises they had a number of demonstrators coming and going the two hours I was there.

Q What if anything were they doing besides coming and going, if anything?

A Well, doing a lot of talking, discussing, arguing with the army sergeant on the premises.

* * *

[fol. 40] Q Now, Mr. Udoff, calling your attention now to sometime shortly prior to 5 p.m., what if anything happened at that time?

A Shortly before 5 p.m. they were asked to leave by the Army technical sergeant and they just refused to leave.

Q Were you present when this was taking place?

A Yes, I was present.

Q What if anything did you do at this point?

A Well I identified myself to the several boys who were there. Some were sitting on the sofa, down on the floor. I showed by identification to them.

Q What form did this identification take, Mr. Udoff?

A What form is it? This identification here that I am the United States Marshall for the District of Maryland, and you fellows are on federal property.

* * *

[fol. 41] Q Now, Marshall, what happened at that point after you showed your identification?

A I told them that the place was going to close in just about a minute or two and would they get up like gentlemen and walk on out. One of the boys shook his head indicating no and I repeated that, I believe one more time or twice. I don't recall the exact number of

times. When they all started to squat down on the floor, on the sofa, I told them then that I was going to request the assistance of the police, who were on the premises, to assist me and they were going to be deputized as marshalls to help me out.

Q Was this in fact done?

A Yes, sir.

Q What happened then, sir?

[fol. 42] A Well they made no attempt to move. It was five o'clock. So I went ahead and picked up the hands of one of the boys on the sofa—he did not offer too much resistance—and some of the gentlemen in back of me escorted them outside.

Q By escorting them, can you physically describe the activity involved?

A This one in particular walked on out with me. I believe the first one I picked out.

Q Can you describe any of the other physical activity you described?

A I picked up one more by the hand and I think, I can't specifically state, because I just passed him right on back, the entire operation consumed no more than sixty seconds.

Q When they were carried back, what if anything was done with these individuals? What if anything was done after you carried them back? What did you carry them back to?

A Just escorted them to the front door and went outside.

[fol. 43] Q Did you see what happened at the front door or anything?

A They sort of disappeared from my view because there were venetian blinds and I couldn't see.

Q You weren't outside at the time?

A We had no jurisdiction on the outside. It was strictly on federal government property, on the inside.

Q Speaking of jurisdiction, marshall, under what authority were you on the premises?

A Well I was under the authority and instructions, legal advice of the United States Attorney for Maryland,

Tom Kenny. But I have a description of what a marshall should do in the case of an emergency.

MR. LIPSON: The State would introduce as State's Exhibit Number 2 the job description of the U.S. Marshall.

MR. WEISGAL: I would object, your Honor. It has nothing to do with this case. As all of Mr. Udoff's testimony.

THE COURT: What is the purpose of the proffered exhibit, to show the authority of the marshall to order the defendants from the property leased by the United [fol. 44] States government?

MR. LIPSON: Yes, sir. To show the U. S Marshall's authority.

THE COURT: Is there any dispute?

MR. WEISGAL: There is no dispute.

MR. LIPSON: If there is no dispute I will withdraw the document. Your witness.

CROSS EXAMINATION BY MR. WEISAL:

* * *

[fol. 45] Q Mr. Udoff, you smiled when you used the word 'escorted' the gentlemen to the door. The first gentleman you said you took him by the hand and two officers got behind them and escorted him to the door. Were you still holding him by the hand?

A I personally did not escort him to the door, I just lifted him up off the seat.

Q I thought you said you escorted him? You took him by the hand, then what happened?

A I lifted him on up and somebody else took him and took him out the door.

Q He was on a chair?

A He was on a little sofa.

Q In other words, you know who the first man was?

* * *

[fol. 46] THE COURT: I'll strike out the last answer as not being responsive. The jury will disregard it. The question is can you identify anyone or more of these young men here in court today? Can you, Marshall?

A Your Honor, I can recognize them all but I just can't identify which one was Number one man that I had to pick up.

MR. WEISGAL:

Q I'm going to tell you who it was, Mr. Udoff. It happened to be this man here.

A It could be.

. . . .

MR. LIPSON: For the record, Mr. Weisgal is pointing to the defendant Mr. Green.

MR. WEISGAL: Mr. Bacheller.

MR. LIPSON: Mr. Bacheller, I'm sorry.

. . . .

[fol. 47] Q Now you say you picked him up by his hands and he got off the sofa, is that correct? Then what happened?

A Well somebody to my rear—

Q Who, Mr. Udoff?

A I don't remember which one of the men because we had so many police officer. All I had was just about at that time only two deputies with me.

Q Just do me one favor, describe, give me your definition of the word 'escorted'.

. . . .

THE COURT: You object to that: I overruled it. What did you do? That is really what he wants to know. [fol. 48] A As I said before I picked him on up and turned him over to somebody in back of me.

THE COURT: That isn't quite clear. Did you pick him up bodily or touch them by the hand and walk out?

A No, I had to pick them up off the sofa bodily, by the hands.

MR. WEISGAL:

Q Mr. Bacheller—

A The first one.

Q The first one?

A Oh, yes.

Q You said you picked him up by the hands, your

testimony as I recalled it, you took him by the hands and he quite willingly got up?

A He didn't resist too much.

Q He didn't resist?

A But he didn't try to get up.

Q He got up?

A After I got—

Q Two officers got behind him and shoved him out the front door?

[fol. 49] A That I didn't see.

Q You didn't see that?

A No sir.

Q You didn't see the rest of the men being escorted out of the door, being lifted up bodily by the police and thrown out the front door?

* * *

A I was in charge at the time. I was looking right in front of me for the next one to be picked up and I did not turn around to see what was going on in the back because I had sufficient men there by that time.

MR. WEISGAL:

Q You had sufficient men there by that time to do what?

A To escort them outside

Q In other words, they were all escorted out the door, is that your testimony, Mr. Udoff?

[fol. 50] A So far as I was able to observe, yes.

* * *

Q What does escort mean to you, Mr. Udoff?

A Just what I said. They had to be picked up, he had to be sort of forced out.

Q Forced out?

A He didn't want to leave.

Q Which one, Mr. Udoff?

A Which one what?

Q Which one had to be forced out?

A That I can't recall either. I'm not able to identify. Several of them had to be carried out.

Q Get back to the first man again. Escorted or pushed?

[fol. 51] A I still say he was escorted out.

Q All right. Now the second man, escorted or pushed, or thrown?

A He wasn't thrown. Not while I was looking at him.

Q You know he wasn't thrown.

A I said while I was looking at him he wasn't thrown.

* * *

Q You said they disappeared from view. Now this recruiting center is on a flat line, you can look straight out the door and see everything that is going on, is that correct?

A To some degree, yes.

Q How did they disappear from view?

A It's quite simple. About five minutes to five the Army Technical Sergeant lowered the venetian blind, [fol. 52] this one great big venetian blind on the store window. Then you couldn't see anything on the outside.

* * *

Q Mr. Udoff, did you in fact stand there with the blinds down in front of the window and just stand there and not look out the window?

A Well, sir, if you want to know what had happened, fine, I'll tell it to you. I didn't go to the window. The blind was down. I went back in a little sergeant's office where he had a desk, waited for the crowd to disperse so we can leave the premises.

MR. WEISGAL: Now—

[fol. 53] THE COURT: Let him finish.

MR. WEISGAL: I asked him if he looked out the window.

A I did not.

* * *

GEORGE K. McKENNY

* * *

[fol. 54] THE BAILIFF:

Q State your name and assignment?

A George K. McKenny. Deputy United States Marshall.

DIRECT EXAMINATION BY MR. LIPSON:

Q Mr. McKenny, calling your attention to Monday March 28, 1966, sometime after three p.m. in the afternoon, did you have occasion to be in company with U.S. Marshall Frank Udoff?

A Yes, I did, sir.

Q Where was that, Mr. McKenny?

A This was at the Army recruiting station on Greenmount Avenue.

Q What if anything did you do there?

A Initially we observed the demonstration that was going on in the vicinity of the recruiting station and we observed the action of the crowd and the demonstration during the afternoon.

Q Did you have occasion to enter the building at that location?

[fol. 55] A Yes, I did.

Q How long did you stay there as you recall?

A As I recall we were there possibly for around, from 2:30 or 3 until about 5:30.

Q Now what if anything did you do around 5 o'clock or shortly before?

A As I recall, around 5 o'clock the sergeant in charge of the recruiting office had to close the office and at that time some of the demonstrators were still on the premises, on the inside of the recruiting office. I believe they were asked to leave and they did not. Subsequently we had to remove them from the inside of the Army recruiting office.

Q Did you personally remove any yourself?

A Yes, I did.

Q How were they removed?

A We took them by the arms and lifted some of them out, those that would not walk and escorted them to the door.

Q Did you leave them at the door?

A Yes, we did.

[fol. 56] Q Who if anyone was assisting you during this process?

A We had some of the other deputies there and also the U.S. Marshall.

Q Was there anyone else involved besides the U. S. Marshall's office?

A There were some officers from the Baltimore City Police force.

Q Do you recognize any of the gentlemen or people that you removed from the office in the courtroom today?

A I can't positively identify them. I see some gentlemen who look similar to the ones we removed.

Q After you deposited them outside, took them to the front door, did you observe anything at that point?

A After we took them to the outside of the front door, that's where our particular end of it ended and we proceeded to close up the office. Shades were dropped and the door was locked and we continued on with our other business.

* * * *

[fol. 57] CROSS EXAMINATION BY MR. WEISGAL:

Q Mr. McKenny, how many men were, did you help remove from the office?

A I can't recall an exact amount I'd say—

Q I'm talking about you personally?

A I can't give you exact number. I'd estimate about four at least.

Q You helped with four?

A I believe so, I can't be sure.

Q By helping, what do you mean, what exactly did you do?

A I escorted the gentlemen to the outside of the door.

Q By escorting you mean you walked alongside of them?

A That's right.

Q Nobody pushed them?

A I don't recall, sir.

Q Nobody threw them?

A I don't believe so.

Q How many police officers were in the Marshall's [fol. 58] office, the recruiting office at that time?

A I cannot give you an exact figure sir.

Q Ten?

A I would estimate, I'd say over six. I can't—

Q Over six?

A I can't specifically say how many.

Q That consisted of the U.S. Marshall—

A He's not a policeman. You mentioned policemen.

Q Oh, there were six policemen. How many marshalls?

A There were about five of us.

Q There were about eleven men actually in the office?

A Yes, approximately.

Q How long did it take to escort all of these six young men out of the recruiting office?

A I again, sir, can't you a definite time period but I estimate about fifteen minutes, somewhere in there.

Q Took fifteen minutes to take them out?

A Just an estimate.

* * * *

[fol. 59] Q Mr. McKenny, you say you just walked them to the door or carried these men to the door and there you went back to get other men?

A That's correct.

Q You don't know what happened to them at the door?

A No, I can't honestly say.

Q Could police officers have been there at the door and taken over?

[fol. 60] A What do you mean to take over, sir?

Q I don't know. Escort them the rest of the way?

A They possibly could, yes.

Q The four men, approximately—how many men were in the office, how many men were escorted out of the office?

A I don't know the exact number, sir. Like I said I believe I escorted about four of them out.

* * * *

Q What do you mean by escort, Mr. McKenny?

* * * *

A As I said they would not leave under their own power, so we walked with them to the door.

Q You walked with them to the door?

[fol. 61] A That's correct.

* * * *

REDIRECT EXAMINATION BY MR. LIPSON:

Q Now, Mr. McKenny, you have testified that you did in fact carry some bodily, is that correct?

A That's correct.

Q Do you recall specifically how many you carried bodily and how many you carried otherwise?

A I don't recall the exact number. As I stated they were sitting down. They were told to move. When they did not move we had to stand them up. If they did not walk we had to carry them.

Q You can't accurately recall how many went on their feet and how many went otherwise, is that correct?

A No, I can't recall the exact number.

. . . .

RECROSS EXAMINATION BY MR. WEISGAL:

Q How many men were used to carry each one, those that were carried?

. . . .

[fol. 62] A I believe two, sir, when we had to carry somebody.

Q You know how many men were in the office when you got there at 3 o'clock?

A You mean demonstrators?

Q Yes?

A I don't recall the exact figure. I would estimate it was over six.

Q Over six?

A Yes.

Q When the time came to remove the men, the demonstrators from the office, you can't tell us how many you removed?

A I estimate it to be around four.

Q That you removed. But I'd like to know how many you estimate were actually removed?

A I don't recall what the exact count was, sir.

Q Approximately

A No, sir.

[fol. 63] Q Can you give an approximation?

. . . .

A I can't give you an approximation.

* * *

Q Of the men that you carried, you remember what part of the body you were holding?

A The arms and the feet.

Q You were holding the arms and the feet?

A The arms and feet.

Q In other words, you were standing on one side holding a man's arm and his leg and somebody was standing on the other side holding his arm and leg, is that correct?

A You can carry them that way or from head to foot.

Q I'm asking you how you were carrying?

A Probably a combination of both, sir.

Q And then you took them to the front door. Did you stand them up when you got them to the front door or place them right there on the pavement outside?

A Put them outside the front door, sir.

[fol. 64] Q On the pavement?

A Well, yes, that's all. That's outside the front.

Q I'm sorry.

A The pavement, that's where we put them.

* * *

FURTHER REDIRECT EXAMINATION BY MR. LIPSON:

Q One further question, Mr. McKenny. In what position were they placed on the pavement when you deposited them outside the door?

A I don't recall, sir. As I recall I believe most of them were in a standing position. There might have been some that were seated but I don't recall.

Q Some were seated you say?

A Yes.

* * *

FURTHER RECROSS EXAMINATION BY MR. WEISGAL:

Q How did they get seated, Mr. McKenny?

* * *

[fol. 65] A I imagine they sat down, sir.

Q Did you see them sit down?

A I can't honestly say that I saw a specific person sit down.

Q Well what you are saying then, you placed each on the outside then on his feet?

A No, sir, I didn't say that. What I am saying is that we placed them out outside. Some may have been on their feet, some may not have been on their feet.

Q In other words, so you placed them outside down on their back? In other words, if you were holding one man by his arm and one man by his foot—

A If they were not standing they were in a seated position.

Q That's how they get on their seat?

A What's that, sir?

Q It's unimportant. How many would you say you put out on their feet and how many in a seated position?

A I said, sir, I didn't recall the exact number.

Q But you didn't throw anybody out, did you, at no time?

[fol. 66] A I didn't throw anybody.

Q You never heaved anybody out of that building, did you?

A Not that I recall, sir.

Q Did you see anybody else heave anybody out of that building?

A Not that I recall.

* * * *

Q Did you observe any of the police officers take anybody out of the building?

A I don't recall, sir.

* * * *

[fol. 67] SGT. JOSEPH DiCARLO,

* * * *

[fol. 68] DIRECT EXAMINATION BY MR. LIPSON:

Q Sgt. DiCarlo, how long have you been employed by the Baltimore City Police Dept?

A Approximately fourteen years.

Q Sgt. DiCarlo, calling your attention to Monday March 28, 1966, sometime in the vicinity of 2:30 p.m., were you in the vicinity of 3328 Greenmount Avenue?

A Yes, I was.

Q What were you doing there?

A I was detailed at a demonstration that was to be held at 3328 Greenmount Avenue, the office of the U.S. Army recruiting office.

Q Were there any other police officers, members of the Police Department with you at that time?

A Yes, there was.

Q Who if you can recall was there with you?

[fol. 69] A Inspector German, Capt. Mooney, Lt. DiPino and nine other patrolmen.

Q Now what if anything unusual did you observe after arriving at the scene?

A Approximately 3 p.m., about fifteen pickets showed up to picket the U.S. Army recruiting office, carrying signs protesting the war in Viet Nam. By 3:15 I would imagine there were about thirty or thirty-five pickets. At 3:20 six gentlemen entered the office of the U.S. Army recruiting office and staged a sit-in.

Q What happened at that point?

A Well the other pickets continued to picket outside with the signs. They were constantly moving. About five of five I entered the office with the lieutenant and the U.S. Marshall being present, and the gentlemen were asked to leave the premises as it was closing time and they were going to lock the doors.

Q Who did the asking, sergeant?

A Sgt. Grumley who was the recruiting officer for the U.S. Army, and U.S. Marshall Frank Udoff who identified himself to the men and told them he was the U.S. [fol. 70] Marshall and he asked them to leave.

Q What happened at that point, sergeant?

A They said they were not going to leave and the U.S. Marshall said if you don't leave I have enough help that we'll have to put you outside. Again they would not leave. At this point the U.S. Marshall asked our assistance in putting the men outside, which we did. A police officer, with a U.S. marshall, placed the men, carried the

men outside to the pavement and placed them on the sidewalk.

Q Can you describe how this was done, Sgt. DiCarlo?

A They were carried bodily. One U.S. marshall and one officer on each side of them that were picked up and placed outside.

Q Where outside were they placed?

A On the sidewalk, immediately in front of the door. Once they were placed down two of the gentlemen tired to crawl back in, in between the door and the door jam so the door couldn't be closed.

Q You speak of gentlemen and gentlemen that were carried out. Do you see any of those gentlemen in the [fol. 71] courtroom today, sergeant?

A Yes, I do.

Q Would you point to them and identify them?

A The six gentlemen sitting here; Mr. Harding, Mr. Klein, Mr. Bacheller, Mr. Heimbach, Mr. Rudman, Mr. Green.

Q And you have testified that they were carried from the recruiting office outside?

A Yes, sir.

MR. LIPSON: For the record, the sergeant has both pointed and identified the six defendants in this case as the gentlemen that were escorted out of the building to the sidewalk.

* * * *

[fol. 72] Q Sergeant, what if anything happened outside on the sidewalk at this point?

A Once they were placed outside on the sidewalk they lied down for about a minute and then they came to a sitting position. Then they were asked several times by me—myself three times—to kindly get up and leave as the large crowd that had been witnessing this demonstration had started to gather around them. Now they gave no response and no indication that they would get up and leave. At this time the lieutenant who was present at the time they were sitting on the sidewalk, he himself asked them to leave, to get up and leave and they would not. He said well then you are all under arrest, because

a large crowd had gathered, they were blocking free passage of the sidewalk. The crowd started to get hostile. They started—

[fol. 73] Q Describe that?

A They started to shout things like "Let us get to them, we'll take care of them". There were two United States Marines. We had to hold them. We sent them across the street and also men from the Navy that we sent across the street. And the crowd did gather in around them. So it did start to get a little wild.

Q What was the approximate size of the crowd, sergeant, at that time?

A At that time I would say the crowd got to be within the neighborhood of eighty to one hundred people.

Q Sergeant, you testified that there were other police officers there. You know whether or not they were personnel from the crime laboratory at that time?

A Yes, there were. Officer Brennan from the crime laboratory and sergeant—I don't remember his name.

Q What if anything were they doing?

A They were taking pictures of the incident as it progressed.

Q Sergeant, were you there at the time the photographs were taken?

[fol. 74] A Yes, I was.

Q I'm going to show you a series of photographs here and ask you if you can identify them, what they depict?

(PHOTOGRAPHS WERE SHOWN TO MR. WEISGAL)

MR. LIPSON:

Q First, sergeant, I show you series of photographs here and ask you if you can identify what is represented on the photographs?

A Yes, sir. These are the pictures that were taken by our crime laboratory at the scene of the demonstration.

Q Were you present when all of these photographs were taken?

A I was at the detail, that's correct.

MR. WEISGAL: That doesn't mean he was present.

A If you mean was I—

THE COURT: This is police language. Explain what you mean, sergeant, by being at the detail when the pictures were taken?

A If you mean was I present when each and every one of these shots were taken and pictures were taken, no. [fol. 75] Not when each and everyone of them were taken.

THE COURT: Did you see the pictures taken?

A I saw them taken, yes.

* * *

Q Sergeant, I show you here a photograph and ask you if you can identify it? Also ask you the approximate time that it was if you can state that?

A This is a photograph taken outside of the recruiting station immediately after the gentlemen were placed on the sidewalk.

Q What time would that be, sergeant?

[fol. 76] A This would approximately had been two, three minutes after five.

* * *

MR. WEISGAL: That picture he states is approximately three minutes after five. After the men had been—

A Placed on the sidewalk.

* * *

MR. LIPSON: I would offer it as State's Exh. Number two.

Q Sergeant, I show you another picture. Can you identify it as to its contents and approximate time?

[fol. 77] A This is a photograph of Mr. Rudman, Mr. Heimbach and Mr. Harding speaking to Sgt. Grumley of the recruiting office inside the office. The only thing I can say about this, these men entered at 3:20, approximately 3:20 to speak to the sergeant. So I would have to say this photograph was taken between 3:20 and 3:40.

MR. LIPSON: The State would offer this photograph as State's Exh. Number 3.

MR. WEISGAL: You would say 3:20?

A Yes, I would say between 3:20 and 3:40.

MR. WEISGAL: I have no objection, your Honor.

MR. LIPSON:

Q I show you another photograph, sergeant, and ask you if you can identify it and come up with the approximate time it was taken, if you can remember that?

A This is a photograph of several of the demonstrators picketing in front of the Army recruiting station. This photograph pictures Mr. Green, Mr. Bacheller, Mr. Rudman, whom I can identify and the only thing I can say about the time on it, it could have been taken—well I would say—

* * * *

[fol. 78] A This could have been taken anytime between 3:00 and 4:45, as all six defendants did not enter at the same time. They entered approximately 3:20 and some went out, came back in. I can only say between 3:00 and 4:45 while the demonstrating was going on.

MR. LIPSON: The State would offer this as State's Exhibit Number 4.

Q I show you another photograph and ask you if you can identify it as to time and content?

A This is a photograph of Mr. Bacheller and Mr. Klein and two other gentlemen who I don't know, demonstrating in front of the office and the time I could only give as the same as I gave on the other.

* * * *

[fol. 79] Q Sergeant, I show you another photograph. Can you identify it as to content and time?

A Another photograph of picketing in front of the Army recruiting office, and in this picture I can identify Mr. Heimbach and another gentleman who was in charge of the demonstration, Mr. Dewedowitz, who is not present in court.

Q Approximately what time was it taken if you recall?

A Between three and five p.m. that day.

MR. LIPSON: The State would offer this photograph as State's Exh. Number 6.

. . . .

[fol. 80] Q I show you another photograph, sergeant and ask you to identify it?

A This is a photograph of the inside of the Army recruiting office, picturing Sgt. Grumley of the U.S. Army recruiting service, Mr. Harding, Mr. Heimbach, Mr. Rudman, displaying a sign which they wanted the sergeant to display in the center next to the recruiting material. And this picture, the time would have to be between 3:20 and 4.

[fol. 81] MR. LIPSON: State's Exhibit Number 7.

Q I show you here another photograph, sergeant, and ask you if you can identify it as to content and time?

A It's a photograph of the picketing again being held in front of the U.S. Army recruiting office. On this photograph I cannot identify any of the people picketing. It was taken, like I said, between three and five.

MR. LIPSON: State's Exhibit Number 8.

Q I show you here another photograph, sergeant, and ask you if you can identify it as to time and content?

A This is a photograph of the crowd that gathered outside of the U.S. Army recruiting office after the gentlemen had been placed onto the sidewalk and this picture would have had to been taken about five minutes after five.

MR. LIPSON: State's Exhibit Number 9.

Q Sergeant, with regard to these photographs, State's Exhibits Numbers 2 through 9, do they accurately represent the scene at the time you saw them and the time the photographs were taken?

A Yes, sir.

Q Sergeant, we have gotten to the point where you [fol. 82] have testified that these people were on the sidewalk, is this correct?

A That's right.

. . . .

MR. LIPSON: For the record, the State has not concluded its direct examination of Sgt. DiCarlo who will [fol. 83] return to the courtroom tomorrow at 10 a.m. The State would reserve the right to put him back on the stand at which time Mr. Weisgal I am sure would like to cross examine.

* * * * *

LT. JAMES DiPINO,

* * * * *

DIRECT EXAMINATION BY MR. LIPSON:

Q Lt. DiPino, calling your attention to Monday March 28, 1966, did you go to the army recruiting station at 3328 Greenmount Avenue?

A Yes, I did.

Q What time, lieutenant?

A Approximately 2:30.

Q Now, calling your attention, lieutenant, to approximately 5 or five minutes before 5 on that date, tell his Honor and the ladies and gentlemen of the jury what if anything occurred?

A Well there had been a large crowd gathering about quarter to three. They started to come in and some of the boys were coming in and out of the recruiting station at that location. I did observe a number of them. They wanted to put up placards or place cards in the window but the recruiting sergeant refused.

* * * * *

THE COURT: * * * Mr. Udoff who is the Marshall stated a fact at the time—I'm sorry about that. The [fol. 85] Marshall who had charge of the inside of the place actually—we had no jurisdiction inside of the recruiting station at that time but I was just standing there so no trouble would start. The boys were all sitting around. In fact they had a girl come in once in a while and then come out and go in line. Five minutes of five o'clock they were told that they were going to close up and to leave. Now I was there when it was told. They refused to leave the place.

* * * * *

[fol. 86] A They were then told the place was going close, approximately five o'clock I would say. They were again asked to leave of their ownself, walk out, and they refused to go out. That is when the Marshall said in my presence he was giving us the right to help them escort the men out. They were picked up and deposited outside on the sidewalk.

Q Lieutenant, you say they. You see those people you indicate as they in the courtroom today?

A Yes, I think I see them.

Q If you do, would you point them out, please?

A It's the six defendants. I only know one by a name, Harding. That's the one with the glasses. One, two, three, four, five, six were the ones that were at the recruiting station, also around the area on the march.

MR. LIPSON: The lieutenant had referred and pointed and indicated the six defendants as the gentlemen that were in the recruiting station at that time, is [fol. 87] that correct?

A I'm sure.

Q What if anything happened at that point, sir?

A Well, I was one of the last ones to leave, to take the last one out. He was placed on the sidewalk. As the crowd gathered—it was a large crowd. In fact there was two Marines in the crowd. I told the two Marines to keep out of it and stay on the side and I put my arms out to protect them. They were sitting down and laying around.

Q Continue?

A They were sitting down and laying around in a circle.

Q Who was sitting and laying around in a circle?

A Six boys.

Q Once again the witness has pointed to the six defendants seated behind the trial table. Who were sitting and laying on the sidewalk.

Now, lieutenant, I'm going to interrupt you at this point to ask in what position, relative to the sidewalk, were these six boys located?

A Clearly, if I can remember as much as I can, one [fol. 88] was sitting up on the north side of the recruit-

ing station, one was in front of the station, one was on the south side, Greenmount Avenue and the recruiting area, one was toward the gutter, near the gutter, but on the pavement and the rest of them were laying in different positions.

Q When you speak of laying, what do you mean?

A Well when they were outside they laid on their back and then they sat up in a sitting position. I asked the people at that time, I really don't remember who were sitting where, but I know there were six defendants because I know they were the six that were inside—I asked them all to get up and move. They would not and I arrested them. I asked them once, I asked them twice. They wouldn't move. They started to sing. I said to the men "Don't touch them, wait until the wagon comes". I said "You're all under arrest". That's when the wagon pulled up and each one had to be picked up bodily and taken over, over to the wagon. The officers taken one side of their leg and back and the other one the other side and deposited across the street in the wagon.

Q Who was put in the wagon, lieutenant?

[fol. 89] A All six.

Q Once again, for the record, he has pointed and indicated all six of the defendants seated behind counsel table.

Lieutenant, approximately how wide is the sidewalk at that location?

A I'd say the sidewalk would be ten to twelve foot wide.

Q Approximately how much of the area of the sidewalk, the width you just described, were these people that were sitting and laying down covering?

A Practically the whole sidewalk in a circle. You couldn't go through. There was sort of a semi-circle because the crowd had gathered in a circle and were trying to get into them. In fact at one spot I had to put my hands out to protect these same people from being trampled.

Q You speak of a crowd. Do you have any indication or idea how many people were in this crowd?

A Yes. I would say it would be anywhere from fifty to one hundred and fifty.

Q What if anything were they doing while these people were on the sidewalk?

A They were protesting and the other ones were protesting against them.

Q Specifically what if anything was said. Do you recall?

A Yes. They said "Bomb Hanoi".

MR. WEISGAL: I object. This is hearsay.

THE COURT: The purpose of proving the possible results, probable results of the action. I think this becomes relevant. I'll therefore overrule your objection. What did you say now, lieutenant?

A I heard them say "Bomb Hanoi".

THE COURT: Who said that?

A The people in the crowd.

THE COURT: You don't mean the defendants?

A Oh, no, sir. They was the outsiders that gathered. It was such a large crowd. We had police all over the area, across the street. We were doing our best to protect these people from really getting hurt.

MR. LIPSON:

Q How many policemen were there on the sidewalk [fol. 91] at this time, lieutenant?

A On the sidewalk I'd say approximately eight to ten.

Q Where were they standing with regard to the defendants who were on the sidewalk?

A On the outside of them, trying to protect them so no one would come in on them. In fact at one time one of my officers directly in back of one person, O told him not to touch them, leave them alone. If they wanted to get up and leave they could leave. They wouldn't get up and leave.

Q Now can you describe how these people got to the sitting position on the sidewalk?

A Sir?

Q Can you describe how the six defendant got to the sitting position on the sidewalk?

A They were deposited there by us.

Q In what form or—

A Carried out, sir.

Q They were carried out?

A Yes, sir.

Q And when they were put down after being carried how were they put down?

[fol. 92] A They were dropped; carried and dropped right out.

Q Did they drop on their feet or dropped on their posterior, in what posture?

A I don't remember. I can only speak for the last one. I was the last one out with the last one. We put him on his feet and they went over and laid down. The last one did. Because I was in the back. The others were taking them out. The last one we deposited, he was put on his feet and he just laid down.

Q You know which one that was, lieutenant?

A No, I don't remember.

Q What if anything was said by any of the defendants as they were seated or sitting on the ground?

A I don't remember if they said anything. All I did was ask them to get up and they wouldn't get up.

Q Who did you address to?

A To the six defendants laying on the ground.

Q How close were you to them when you said this?

A I could have touched them on their head, the one on my side. In fact, like I said again, I reached with my arms outstretched, with two Marines behind me, to protect them from getting to them. In fact I even turned [fol. 93] around and said to the two Marines, "You stay out, it's none of your business", at that time, "get away from here". In fact I'm positive of that. I asked them again to get up and they wouldn't get up.

Q You speak of protecting the defendants from the crowd, Can—Why did you feel that you had to protect them?

A Well, I think—I can't say what I think, but at that time it was sort of a debate between these boys and some of the crowd that was walking and the outsiders. In fact I know from observing them they were going out

of line and going into conversation with another party, debating about the Viet Cong situation. I overheard it. I wasn't saying anything to them as long as they were peaceful. They were going back in line again. Some were going out again passing circulars, certain other ones. As long as the peace was not disturbed I wasn't doing anything about it.

Q With respect to the six that were seated on the pavement, you mentioned that you were there to protect them, is that correct? Why did you feel protection was necessary at that point?

A On account of the crowd was a little angry about [fol. 94] the whole situation.

Q Can you describe specifically these manifestations of anger already there than what you have done?

* * *

A One man said "Let me get to them, I'll bust him in the mouth". I said "You'd better stay away, we'll handle the situation, we have enough police around".

MR. LIPSON:

Q Now, where, if you know, was Sgt. DiCarlo at this time?

A Sgt. DiCarlo was right in the circle near me at that time.

Q Did you overhear Sgt. DiCarlo say anything to the group?

A He also asked them to move.

Q Your witness.

CROSS EXAMINATION BY MR. WEISGAL:

Q Lieutenant, why did you go to that area 2:30 on Monday?

[fol. 95] A I was informed by my captain to have a detail placed there, there was going to be a march in front of the recruiting station.

Q In other words, the police had been informed that there was going to be a demonstration?

A Yes, they were.

Q As a result of that information you received you and how many police officers went up 2:30?

A Actually it was supposed to be one from the district. At the time I arrived there was about six officers with me besides Sgt. DiCarlo and myself. Sgt. DiCarlo and myself arrived at the recruiting station about 2:30 and about six more officers came from the detail at that time. All told, I'm not too certain at this time how many officers but I would say about twelve. But may I say this. Also across the street the Northeastern District, which I was unaware at that time, had sent officers. Also the traffic had sent some officers and we also had C.P. 11, which was an emergency car, was also there. But that wasn't my detail. My detail was my men from Northern District.

Q When you arrived on the scene, were there any [fol. 96] pickets there yet?

A No, sir.

Q To the best of your recollection, what time did the first group of pickets arrive?

A It was approximately quarter to 3.

Q About quarter to 3?

A Yes, sir.

Q Where were you when they arrived there at quarter to 3?

A I was in the recruiting station when I saw them arrive and I walked outside.

Q Approximately how many pickets came to the scene at that time?

A They were coming in dribbles. Two came, then three, then four.

Q In other words, let's say at 3 o'clock you would say there was approximately 15 pickets there?

A Yes, I would say there was about 15 pickets.

Q Of these 15 pickets, who were there, did it include the six defendants?

A Well I don't remember whether it included the [fol. 97] six defendants or not.

Q Do you remember when the six defendants arrived?

A Well I was made certain of the six defendants when they went inside to the recruiting station.

Q Approximately what time did they go into the station?

A Well I wasn't too sure of the time but I would say they were in there approximately an hour to an hour and a half.

Q They were in there an hour to an hour and a half? I want to know what time they went in?

A I would say about 3:30. I'm not sure of the time.

Q How many police were on the scene at 3:15?

A Well I had a detail of about twelve police.

Q Twelve police officers were there? And while these young men were in the recruiting station, the picketers on the outside were still marching around, is that correct?

A Yes, they were.

Q And were they carrying signs with them?

A Yes, they were.

Q And was a crowd gathering around these pickets?
[fol. 98] A The crowd—Well let's put it this way. When they were marching, people who were walking across the street, they observed the crowd across the street and came over to look, and as they were marching, some of the marchers were stepping out of line, they were giving out circulars to these people. One particular one objected very much to receiving the circular, sort of got in a little argument and we had to disperse that. As they started in, other people that would hear this debate, would come over and join in the debate also. You don't want me to tell you what happened, counsel? One was arrested during the debate—supposed to be some eggs thrown.

Q You know that had nothing to do with it, you know better than that, lieutenant?

A I know it didn't, but these were all the people that gathered and caused the disturbance.

Q You also want to tell them he was dismissed by the judge at Northern?

A Yes, he was dismissed.

Q While pickets were walking around outside there, obviously people were gathering as you state and the [fol. 99] pickets were still marching around, isn't that correct?

A Yes.

Q Everything was peaceful, wasn't it?

A I don't know what you mean by peaceful.

Q With the exception of this one man you arrested who was later found not guilty in Northern Police Station. Did you arrest anybody else?

A No. It was such a large crowd gathering that we had all we could do—In fact the picketers could hardly move one step at a time they were so bunched together and the people were pressing in.

Q What was the conduct of the people on the picket line? Were they acting in an orderly manner?

A I could say I had no trouble with them.

Q They were all carrying signs "Why Are We In Viet Nam?"

A I can't say they were all carrying signs. Some of them were carrying signs.

Q Now during this time you had no difficulty with the crowd or the people that were watching the picketing, did you?

[fol. 100] A Counsel, you don't want me to answer about the other things, so I can't answer.

Q You had no problems. Did you at any time attempt to disperse the crowd?

A Yes, many a time.

Q Did you send them away?

A I tried to disperse—not your crowd, no, but the other people to stay away.

Q And they left, didn't they?

A No.

Q The crowd?

A No, the crowd stayed on the outside of the fringe of the marchers until five o'clock when they were taken out.

Q Everything was orderly there, their marching, carrying these signs and you have testified—

A There was a little commotion previous to that as I told you before. You said to me I shouldn't have brought it up. Now if you want me to tell the truth, I'm telling you the truth. There was a little disturbance before that.

Q But this was someone who came there not involved [fol. 101] with these people?

A Yes, he was marching with them. He definitely was marching with them.

Q He was taken out of line though, wasn't he?

A No, he wasn't taken out of line. You want me to tell you? He went over, from what I understand, he wasn't taken out of line, he was going out of line and debating with people and going back in the line. He was marching with these people. And there was a disturbance before they were arrested. That's what I was trying to bring out.

Q Lieutenant, let's limit it to these six men and their actions and what they were doing and the crowd that was so hostile around there?

A Yes, sir.

Q For three hours these picketers were marching around outside of the recruiting station?

A Yes, sir.

Q And you told me you had no trouble with them, with any of these picketers?

A No, I had no trouble with these pickets.

Q Therefore you would have no cause to tell them [fol. 102] to leave?

A No, sir.

Q You stated that they were going around into the crowd, a number of these picketers, and were distributing leaflets?

A Yes, sir.

Q They were going right into the crowd with these leaflets? Isn't that correct?

A When you say a crowd, can I explain? These boys with some of the other protesters were actually marching in a circle. They took practically the whole pavement. Other people didn't go in with them but they were on the outside of this circle, pressing in.

Q Right?

A But it was in a circle. It wasn't a crowd bunching together.

Q You were in complete control of the situation, weren't you? You had enough police officers there. The pickets weren't giving you any trouble and if any of the onlookers became a bit obstreperous you would ask them to leave?

[fol. 103] A Counsel, I was there to protect them.

Q While you were walking around there, incidentally, lieutenant, did you see where the signs were being kept?

A I can't remember where they were kept.

Q Isn't it a matter of fact there was a tremendous batch of signs right near next to that recruiting sign? In fact there's a picture of it, isn't there? Some of the placards right down here.

A Yes, sir.

Q Isn't it true as additional picketers would come up to this scene of this picketing that they would go over, pick up a sign and continue marching around the crowd, rather with the pickets?

A You mean to say they were coming in every five minutes and picking up signs, is that what you are trying to say?

Q When it started it was fifteen pickets. At the end, at five o'clock, according to your testimony before, you said there was somewhere in the neighborhood of thirty-five or forty?

A Well as far as the signs were concerned, I don't [fol. 104] remember, but they were bringing signs with them in their arms.

Q People were walking into the line, walking through the crowd, picking up signs and going ahead?

A I don't remember actually.

Q But there were thirty-five or forty people?

A But I don't remember them picking up signs every minute and going in line. They may have come and picked up a sign and walked in but I don't remember them giving them out every minute.

Q You do remember though a number of picketers going around and handing out leaflets to the crowd?

A Yes, I do.

Q Now, lieutenant, you used the word 'deposited', when you say the men were deposited on the pavement outside. After five o'clock the men in the recruiting office were removed from the recruiting office, is that correct?

A Yes.

Q Did you see any of the men thrown on the pavement?

A To my recollection, when you say thrown, I don't [fol. 105] know what you mean. They were taken out and put on the sidewalk. They may have been dropped. If you are talking about taking them out and dropping them, I didn't see that but I know the last one I had, I put down on the sidewalk.

Q You said before in your direct testimony they were carried and dropped?

A Deposited on the sidewalk.

* * * *

Q Will you differentiate for the jury the difference between being dropped and being deposited?

* * * *

A You want me to answer that? When I said deposit, I mean they were carried out and put down. I don't know, if you call deposit to drop from a height about [fol. 106] that much, maybe they were.

MR. WEISGAL: Show that to the jury. Stand up and show that to the jury.

A They were dropped of a height of about that much I'd say deposit. They were carried out,—if I can demonstrate?

* * * *

Q Where did you hold them?

A One was here and one was here and one on the other side, carried out. If they were here and they dropped them there, they could have dropped them but I remember the last one I had, when I brought him out, I had him here like this and we put him down feet first and he went and laid down.

THE COURT: That's a question I think counsel wanted to have you answer. Did you bring them out feet first or drop them in some other fashion?

A Your Honor, when I said deposit I said that I was [fol. 107] in the back, the last one to come out. When I brought mine out I deposited him on his feet.

THE COURT: Then he went down?

A Then he went down.

THE COURT: In response to the law of gravity, not making any effort to stand up?

A Yes, sir. When I asked them to get up they wouldn't get up. They got up in a sitting position. I asked them twice. They started to sing. Then they started to sing. I said "Wait" to the men "wait until the wagon comes". I said "If you don't get up you're under arrest". They wouldn't get up; they were under arrest.

MR. WEISGAL:

Q Is there any possibility these men did not hear you say get up?

A No, sir.

Q What was the crowd doing at this time?

A Well the crowd was pushing in.

Q What had happened to the pickets, the people who were then carrying these signs "Stop IN The Name of Love", "Why Are We In Viet Nam?", "Let's Get Out [fol. 108] of Viet Nam", and all of the other various signs?

A Well my recollection is they were trying to march and couldn't march through them because they were stopped in a group in a bunch. In other words, it became a circle where these men were sitting, sitting around, laying down. There was a complete circle and among this circle was some of their own people with the outsiders who were all grouping in.

Q In other words, a circle formed around all of the six people who had just been—

A Just laid in a semi-circle, in a circle.

Q When you say they laid in a circle, they were dropped one on top of the other and they had to lie there for a few minutes before they could even sit up, isn't that correct?

A No, sir. No, sir.

Q That's not so?

A No, sir.

Q You mean—

A They had ample time to get up. I gave them plenty of time to get up.

[fol. 109] Q You gave them plenty of time?

A I asked them twice. They didn't want to get up.

Q At this point you say the crowd was becoming very unruly, the crowd was shouting "Bomb Hanoi", is that correct?

A I don't know what you mean by unruly. I know they were pressing in. I told you again I had two Marines behind me I had to stop from coming in.

Q What did you do to disperse the crowd, anything?

A Actually we had all the police holding the people back from getting into them.

Q You were holding the people back? Were the people actually trying to get into them?

A At one time I had my hands back and I dispersed the two Marines and stayed up in a position, like this, and my men were out there holding them back so nobody would come into them to do them bodily harm.

Q Were the Marines very angry?

THE COURT: Marines you say?

A Two Marines.

MR. WEISGAL: He said there were two Marines.

[fol. 110] A Well by the color of their face and seeing how pale they turned I'd say they were very angry.

Q Would you say standing next to the Marines were a group of picketers holding signs, also protesting the war in Viet Nam?

A I'd say they were mixed.

Q Right. Therefore these people, lots of picketers were right next to the Marines and in fact the crowd had not, the picketing had stopped completely, isn't that correct?

A They couldn't march.

Q They couldn't march because you just dropped six men right out in the middle of the sidewalk, isn't that correct?

A No, sir. They couldn't march because these six pickets wouldn't get up.

MR. LIPSON: Once again he has pointed to the defendants seated behind the trial table, identified them.

MR. WEISGAL:

Q How did you tell them to get up? When is the first time you told them to get up?

A When they were lying in this circle; one here, [fol. 111] one here, one here and one here, I was like this. I said, "All right, come on, get up".

Q Wait a second. They were all lying around in front of the recruiting office, they weren't on top of one another?

A No, sir.

Q They weren't bunched together?

A No, sir.

Q They were at no time thrown on one another?

A I don't know if they were. You asked me that before. I told you I was the last one out. I know they were deposited outside. They all took a position in a circle.

. . . .

Q What was their language at the time they were being taken out?

[fol. 112] A Nothing. They didn't want to go out of the place. They were asked to leave. They didn't say nothing.

Q They said nothing, is that correct?

A Yes, sir.

Q They at no time used abusive language toward the police?

A The only thing they said, they were asked—You want me to answer the question? "We're not going out, we have a right to put cards in your window as well as you are about being for the other side".

Q One of the men said that?

A Yes, sir.

Q He said he thought he had a right—

A They had a right to be in there. They were told to leave at five o'clock, the place was closed.

Q We're outside now.

A They were put outside.

Q I asked did they use any obscene language?

A No, I never heard anyone use abusive language to the police.

Q When is the first time you told them to get up?

[fol. 113] Q When I was the last one to come out. When I came out they were laying down around the sidewalk. The crowd started gathering. I asked them to get up.

Q Did you direct it to anyone in particular?

A The whole group. I couldn't go to each one separately, touch them on the shoulder and say all of you get up. They were all in close formation, which was a circle, a circumference from that end of the bench right around here. That's how big the circle was.

MR. LIPSON: Indicating a diameter of about eight feet.

A About that. I asked them to get up and I asked them twice. They were not on top of each other.

MR. WEISGAL:

Q Right. At this time they were not on top of each other?

A I don't know what you mean at this time. When I was out there they were all scattered in a circle.

Q What was the crowd doing at that time?

A All in a circle

Q Forgetting about the demonstrators or the pickets, [fol. 114] what was the crowd doing at this time? You said there was something about "Bomb Hanoi".

A They were hollering "Bomb Hanoi". In fact I told you again about the two Marines.

Q Let's stop there. The crowd was shouting "Bomb Hanoi". Was it loud?

A Yes. I heard it.

Q You heard it. Now could it have been so loud so they could not have possibly heard you say get up?

A No, sir; definitely not. In fact I had my arms almost on top of one when I said it.

Q Who?

A I don't remember. But it was one of the six defendants. I asked them to get up and move. We didn't want to lock them up, we wanted them to get away, to clear the streets so people could walk. I asked them again. I said to my officers, "Don't touch them, don't put a hand on them. If the wagon comes, they still refuse to move, we'll have to go". In fact they wouldn't get up, we had to carry each one separately.

Q I understand that. When did you tell them they [fol. 115] were under arrest?

A After the second time, I said they were going to be put under arrest.

Q This is what I'm trying to get, when is the first time you told them after they had been taken out of the recruiting office?

A Approximately 5 o'clock when I went out. It could have been within two to three or five minutes, inbetween that time. I don't remember.

Q You told them to get up?

A Yes, sir.

Q You say you were talking to all of them, is that correct?

A Yes, sir.

Q Then when is the next time you told them to get up?

A When I seen there could be violence. Again I asked, when I seen the two Marines that were pale in their face, why if they're not going to get up they can be hurt. I asked them again. They still wouldn't get up.

Q Who were these two Marines standing next to? [fol. 116]

A I don't know who they were.

Q Suppose I were to tell you one Marine was standing right behind a man carrying one of the signs?

A It's possible. I said they were intermingled.

Q Look at this picture now, lieutenant. It shows you—this was taken by you department. This is Exhibit Number two. There you are standing there. There is one of the men carrying a sign. This is a man in uniform standing there?

A Yes, sir.

Q Now obviously if this man is anxious to do some harm he had this man right next to him. There—

A There was another Marine with him. This boy went up ahead of him. There's another Marine back—

Q It shows these men were down on the ground?

A Yes. Here is the—here is one here, one here and one man back in there.

Q What are these men on the ground doing that is creating a disorder at that time?

[fol. 117] A Well, your Honor, from what I seen and I seen these men laying on the sidewalk where nobody could go through them, other people are moving in to do bodily harm, in my opinion it was disorderly conduct. We gave them ample time to move, to clear the sidewalk. They obstructed practically the length of the sidewalk from the recruiting office to the gutter and there is no one could get through. In fact, like I said before, when I seen the crowd closing in I arrested them also to protect them from being hurt.

MR. WEISGAL:

Q The crowd was shouting "Bomb Hanoi", the picketers were singing "We Shall Overcome", is that correct?

A Is that what they were singing? I don't know.

THE COURT: Did you recognize the tune?

A Your Honor, I'd say at that time I was pretty busy.

MR. WEISGAL: At this point the crowd and the [fol. 118] picketers are all together, isn't that correct? They are completely intermingled, the entire crowd?

A They are not completely intermingled.

Q Look at this picture.

A I don't say a whole crowd. You say a few, yes, not a whole crowd. I say a few was intermingled. This doesn't show the whole crowd.

Q How many people were there at that time?

A Fifty to one hundred and fifty people.

Q Would you say that forty to fifty of them were picketers?

A I didn't count them. I'd say about thirty-five.

Q How would you describe this crowd, lieutenant?

A Hostile.

[fol. 119] MR. WEISGAL:

Q You would describe it as hostile?

THE COURT: Hostile to whom?

A As I said before, I can answer, I have nothing to hide. This crowd, I was afraid this crowd might injure these boys and the rest of them, they were debating back and forth about Bomb Hanoi and different things and I had to be out there to protect these people because they wouldn't leave. When they were sitting down they refused to get up and they were creating a disturbance because people were coming from all over, from across the street.

MR. WEISGAL:

Q Now, lieutenant—All right. What attempt did you make at this time with all of the officers you had there to disperse this crowd?

A We had the officers in a circle dispersing them so we could push them back and hold—If you could see some of the pictures, if you were there—

[fol. 120] MR. LIPSON: If there are extra pictures the State's Attorney doesn't know about it.

MR. WEISGAL:

Q Were there any fights among the crowd after the men—Now I'm directing your attention now to after the men had been put out on the pavement. Were any of the other demonstrators attacked?

A No, sir. To my knowledge, no, sir.

Q Were there any fights any place in the crowd?

A No, sir.

[fol. 121] Q Singing some tune?

A Yes, I said they were singing.

Q You mean to tell me you haven't heard "We Shall Overcome" from all the time—

A Counsel, I said before I was pretty busy.

Q You said you told them twice to get up and you said you heard Sgt. Di Carlo also say to get up?

A I don't remember how many times Sgt. DiCarlo said anything to the boys. I heard DiCarlo ask him, he [fol. 122] was alongside of me. I asked them twice myself.

Q Lieutenant, I guess really the one point I'm driving at, did you warn all of the pickets, demonstrators if they didn't get up they would be arrested?

A Well again I'll say that I was in such a small circle, I said it loud enough for everyone to hear me.

THE COURT: What did you say. That's what counsel asked?

A I told them to get up, if they wouldn't get up I said before somebody gets hurt—I said it again if you don't get up the second time I'm going to have to place you under arrest.

MR. WEISGAL:

Q Did you just say it like that? Was it said one right after the other?

A Maybe a minute or two, I don't remember exactly. But it was the first time I said because I even said to my officers, don't touch them, give them ample time to get up. They wouldn't get up, they just laid there. I said it twice, I remember it distinctly and I said it loud enough for them to hear me.

[fol. 123] Q Now you say the crowd was hostile. Were there any—

A I said they were hostile, yes.

Q Can you attribute this hostility to any of the actions of the defendants?

A Yes, they were protesting against them. They didn't like what they were giving out in literature.

Q They didn't like what these people were giving out?

A Yes, sir.

Q That's why the crowd was hostile?

A When I made a remark, hostile, I took it for granted because of the Marines how his face was and how he was coming in. I asked him don't get into it. I figured in my mind the crowd was hostile. In fact I'll be real serious with you, I thought the boys may get hurt if they continued to lay there. When I asked them to move they wouldn't move. Even by their own people because they would have been stepped on if they kept marching.

Q The picket line had already ended, we agreed on that?

[fol. 124] A No we didn't. They tried to picket and couldn't. They couldn't move on account of they were laying in a circle.

Q We have got this picture here identified as 5:05. You will admit, will you not, lieutenant, that it is impossible for the pickets to certainly move in this type of an area?

A But they—

Q Just give me a yes or no?

A But they tried to picket and they couldn't move on account of the defendants laying down.

Q They were still holding their signs, weren't they?

A Yes, sir.

Q They were mingled in with this crowd?

A In fact they had one girl with a baby we had to almost protect from her getting hurt. She was marching with a couple of babies in that crowd. We had to have the officer stay so the little children wouldn't get hurt.

.

[fol. 125] Q In this picture here all of the police have their back to the crowd, is that correct?

A Not all of them. We have two here going this way.

Q Where?

A This isn't the contingent of the Police Dept. We have police on the outside of here. This is some of my men here.

Q We can see one, two, three, four, five, six, seven,

eight police right there. All of them are looking at the [fol. 126] pickets, is that correct?

A No, they're not. Here's one man looking out that way.

Q That's you?

A No, this man. This man. I'm looking out that way, looking over the fringe of the crowd, see that nothing happens. That's what I was doing.

Q You have got your hand behind your back. Here's a soldier standing next to a picket?

A This picture does not show my previous action. I was trying to tell you my previous action that I reached across this crowd and tried to tell them to leave and that's when this other picture was taken after I had reached the crowd. I had already asked them to get up before that picture was taken.

Q What I'm getting to, weren't the picketers and the crowd now completely mixed up, they were standing next to one another?

MR. LIPSON: Your Honor, I would still object. The question has been asked I don't know how many times and the answer given.

[fol. 127] THE COURT: I have an objection before me. I think the question has been answered but I'll permit it one more time. The question simply is, lieutenant, as I understand it, at the time that picture was taken, whenever it was, at that particular time now, the pickets and the crowd that had been menacing them or was menacing them was pretty well confused with, one with the other, is that correct?

A Yes, sir. Some of the crowd was intermingled in the front but there was a bunch of the crowd on the outside that wasn't. The pickets were all in a group inside, most of them, and the few that was outside were intermingled with them. He asked me if all of them were. They were not all. There was some but not all.

* * * *

MR. WEISGAL:

Q What specific action did the defendants commit

[fol. 128] that made the crowd hostile? What did they do, in other words, in any way made the crowd hostile?

.

A I don't know. Like I said before, if you want me to repeat—by looking at the Marine and seeing how pale he was. It was one of the indications he was angry.

[fol. 129] Q Angry about what?

A Of what was taking place, he was against. Like I said to you before.

Q You said the fact these people were protesting the war in Viet Nam and—

A And he was a Marine, yes.

Q The crowd was hostile for the same reason?

A I said I didn't know.

Q Maybe the crowd wasn't hostile, was it?

.

A I I have seen a lot of crowds. When I say I asked these boys to move more for their protection I was only looking out for their portection. When they were laying around and wouldn't move, believe me I did lock them up for their protection.

Q MR. WEISGAL: In other words, you were protecting them against what?

A Being hurt or trampled from the crowd.

Q By whom?

[fol. 130] A I said by the crowd.

Q Why?

A Because they refused to move. They were all over the sidewalk.

Q You mean the crowd was mad at them because they wouldn't move?

A Because they were marching in protest.

Q About what?

A About the Viet Cong. Against the recruiting station for not allowing signs. I was only there to preserve the peace, counselor. I don't take sides.

Q I understand that. At any time did you give orders to your other officers to disperse the crowd?

A The officers were told to keep the crowd back as much as they can and hold them back so no one would

be hurt. Actually I didn't tell them but they know that from experience.

Q Who gave them, who specifically ordered to disperse the crowd? You didn't get anyone to pick up one of these microphones and say, all right, everybody move along, its all over, just move along?

[fol. 131] A After they were placed in the wagon we dispersed the whole crowd.

Q Not until after they were placed in the wagon? At that time, in other words, there is no need for a crowd any longer. Prior to that—

A I'll answer to the best of my ability. Even your own people who were marching wouldn't disperse.

Q How many officers did you have there?

A I said I had twelve, plus the Northeast had sent some over from the other side. The Traffic had sent a man up there and we had C.P. 11.

Q Actually you could have gotten more officers if you needed them, couldn't you?

A I guess we could have, yes.

[fol. 133]

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[fol. 134]

LT. JAMES DiPINO,

FURTHER CROSS EXAMINATION BY MR. WEISGAL:

Q Lieutenant, in your testimony yesterday you stated that it took approximately from two to five minutes after the defendants were arrested to remove them to the paddy wagon that was located across the street from [fol. 135] the recruiting station, is that correct, sir?

A I thought I said from one to five minutes.

Q I'm not trying—Fine. How were the defendants taken across the street?

A They were picked up and carried.

Q They were picked up and carried and placed in this patrol wagon?

A Yes, sir.

Q Now who called the patrol wagon, lieutenant? Was it you or one of the other officers?

A I don't recall. All I did was tell them to call the wagon. I don't remember who called the wagon. I didn't. I told them to call the wagon but I don't know—

Q Approximately when did you tell them to call the wagon?

A After I told them twice to get up.

Q After you told them twice?

A They refused to get up. I said, let them alone. One of the officers was going to take hold. I said, "keep your hands off". They refused to get up. I said "O.K., call the wagon".

[fol. 136] Q You know where the wagon came from?

A No, I don't.

Q Would you assume—Well when you say call the wagon, you would assume you told them to call Northern Police Station?

A Oh, yes.

. . . .

MR. WEISGAL: Well I would accept either radio call or telephone call from the lieutenant, who then says to someone, call for the wagon. Isn't that correct?

A Well I'm not sure whether we had the wagon in the neighborhood or not. I'm not too sure whether we had the Cruising Patrol cruising or not.

THE COURT: How do you put the radio calls in?

A Radio car. For the Cruising Patrol all you do is pick up the mike and call for the wagon.

. . . .

[fol. 137] Q You assumed that the wagon was called, is that correct?

A That is correct.

[fol. 138] Q If you would tell someone to call the wagon, they would call the police station to which you are attached, is that not correct?

. . . .

A No, not necessarily. We have radio cars in the

area, you just pick up the mike and just call for C.P. 5, to a certain location.

MR. WEISGAL:

Q What does C. P. 5 means?

A That's the wagon assigned to Northern District.

Q Meet you at—In other words, you called Northern Police Station? You surely wouldn't call Sourthern, would you.

A No, sir, we do not call Northern Police Station. That's right to communications, sir.

Q Lieutenant, you know exactly what I'm saying. You call communications and the call goes to Northern Police Station?

A No, because the Cruising Patrol is cruising. They do not have a stationary position in the stationhouse.

[fol. 139] Q The paddy wagon is cruising?

A Yes. That's why it's called the cruising patrol.

Q It was after you told these men they were under arrest after, all six were out on the pavement, that you called the paddy wagon, is that your testimony?

A After the second time.

Q After the second time?

A I asked them to get up. I says, call the wagon.

Q Incidentally, you are attached to the Northern Police Station?

A Yes, sir.

Q All the officers there were attached—

A No, sir, they were not all attached to Northern.

Q With the exception of the U.S. Marshall?

A No, sir, they were not all attached to Northern.

Q They weren't?

A No, sir. I stated that the Northeastern District had sent some officers that were across the street and also Traffic and C.P. 11, which is assigned downtown to the Riot Squad.

Q The bulk of the officers though came from the [fol. 140] Northern Station? Strike that question. What district is the recruiting center in?

A Northern District, sir.

Q Thank you, sir. No further questions.

THE COURT: What district is on the opposite side of the, of Greenmount Avenue?

A Northeastern District.

THE COURT: Does that clear up that problem, Mr. Weisgal.

* * * *

[fol. 141] SGT. JOSEPH DiCARLO,

having previously been sworn according to law, was recalled to the stand and testified further as follows:

* * * *

(The last question asked by Mr. Lipson was "What if anything happened at the point that both you and Lt. DiPino arrested these men?" Objection by Mr. Weisgal)

THE COURT: Objection is overruled.

A When we addressed these men and asked them to [fol. 142] get up and leave, we got no response, and I myself asked them again to get up and leave and still there was no response. This is as they were sitting on the sidewalk in front of the Army recruiting station in a circle. The third time I said "Gentlemen, if you don't get up and leave we are going to have to arrest you", and they did not answer. So with this the lieutenant says "You're all under arrest", and at that point we called the wagon and they had to be carried bodily from the pavement to the wagon. We asked them to walk and we didn't get any response from them at this point either.

MR. LIPSON:

Q Now, sergeant, you speak of individuals being carried from the sidewalk in a laying or sitting position on the sidewalk to the wagon. How many were there, do you recall?

A How many were arrested?

Q Yes, how many were arrested and how many had to be carried from this position on the pavement to the paddy wagon?

A The six defendants.

Q The six defendants. You see those six defendants [fol. 143] in the—

A I did not see all six of them being carried. I did not carry any myself. I went over to the wagon with the first group of officers who was carrying the first person arrested and I went over to the wagon and stood there.

Q Do you see the six defendants who were laying on the sidewalk in the courtroom today?

. . . .

A Yes, I do see the six men that were sitting on the sidewalk.

. . . .

Q What was the position or positions of the six individuals that you referred to on the sidewalk?

[fol. 144] A At what time? At the time of their arrest or when they were first placed on the sidewalk?

Q Starting when they were first placed on the sidewalk?

A When they were first placed on the sidewalk they lied down for about a minute. Then they came to a sitting position. Now the six men that were in the sitting position on the sidewalk are in court and they are the six defendants here if you wish me to identify them by name. Mr. Harding, Mr. Green, Mr. Heimbach, Mr. Klein, Mr. Bacheller and Mr. Rudman.

MR. LIPSON: For the record, Sgt. DiCarlo has pointed to and identified by name the six defendants seated behind the trial table who were sitting on the sidewalk at the time of their arrest.

. . . .

Q Now, sergeant, can you establish an interval of time from the time that they were first placed on the [fol. 145] sidewalk until the first warning to get up?

A Well it would just be a matter of a minute or two because when they were first placed on the sidewalk, that is when the crowd started to come around and we had police officers there holding back the crowd and some of the picketers who were at the scene also. Probably

just a matter of a minute or two because we wanted to get them up and out of there as soon as possible.

Q Can you establish the time interval between the first warning and the second warning?

A Minutes? It was almost one right after the other. I think all three warnings must have been given within a matter of a minute. The first time I asked them, I says, "Gentlemen, let's get up and go now". They didn't respond and I said "Come on, let's get up and go". Still no response. I said "If you don't get up and go you will all be arrested". Just about that time, maybe thirty seconds, no more than a minute.

Q With regard to the crowd, sergeant, what was the position of the crowd with relation to you and the six men on the sidewalk?

[fol. 146] A Well the six men were sitting on the sidewalk in a circle. The crowd—I was facing the north. Now the crowd started to come from, were facing me—In other words, they were facing south and out in the street along the gutter and some up behind me too.

Q Now you speak of the police officers being around a semi-circle, is that correct?

A Yes, trying to hold back the crowd, or protecting the demonstrators and at the same time holding back the crowd.

Q What if anything was the crowd doing at this point?

A Well they were pushing closer and they were making some remarks.

Q What type of remarks? If you recall?

A As I recall I do remember one remark, two remarks coming from the crowd. I don't know who made them but the remarks such as "Let us take care of them", "Let us at them". These are two remarks. "Let us take care of them", and "Let us at them". This is not word for word.

Q At this time, that being the time these six men [fol. 147] were on the sidewalk, did you have occasion to address or warn, have any communication with any members of the crowd other than the picketers or six defendants?

A Me personally? I did not talk to anyone in the crowd, no. But there were two U. S. Marines that were pushed back—not pushed back but asked to go to the other side of the street.

Q Why were they asked?

MR. WEISGAL: You mean by you?

A No, sir, not by me.

MR. WEISGAL: How can you ask him this question?

A I did not talk to anyone in the crowd personally, no, sir.

MR. LIPSON:

Q Were you in the presence of whomever asked the Marines to move?

A No, sir, I was not.

Q Approximately how far or how close were you to anyone or all of the defendants when you asked them to get up?

A I was standing right in back of them. In fact they were sitting in a circle and I was standing in back of [fol. 148] one or two of them. But which one it was I don't know but I was right behind them, exactly right behind them.

* * * *

CROSS EXAMINATION BY MR. WEISGAL:

* * * *

[fol. 149] Q Sergeant, how many times did Lt. DiPino tell the defendants to get up, if at all?

A I don't know exactly how many times he told them but I do distinctly remember one time.

Q You do distinctly remember one time. Now why, if [fol. 150] you were standing there in the circle wouldn't you have heard every time the lieutenant told these men to get up, if he told them to get up?

* * * *

A At the time I was also busy holding back the crowd and I was also asking the defendants to get up.

MR. WEISGAL:

Q Therefore it's your testimony that you're holding

back the crowd—Well, let's stop there. Would you show me how you were holding back the crowd, in what manner?

A With my arms.

Q You were holding back with your arms. Was your back to the crowd or were you facing the crowd?

A My back was to the crowd.

Q Your back was to the crowd. So as you were holding back the crowd you obviously could face Lt. DiPino, isn't that correct?

A Yes.

Q Therefore I ask you again how many time did he tell the defendants to get up?

[fol. 151] A I know of one time.

Q How many time did you tell the defendants to get up?

A Three.

Q Three times? Three times within the space of what, what time?

A I guess it would have been all said within a matter of maybe thirty seconds, forty-five seconds.

Q Your testimony before was "Let's get up and go", is that correct?

A That's right, sir.

Q Nothing happened?

A I said "O.K. fellows,

Q "O.K. fellows, let's get up and go" [fol. 152] said "O.K. fellows let's get up and go". Then you while you're holding back the crowd and you are telling these fellows to get up and go, is that correct?

A That's right, sir. I wasn't alone, Mr. Weisgal, I had other police officers.

Q You're saying this crowd was very hostile?

A Yes, I would say they were.

MR. WEISGAL:

Q Were you asking them to get up and go into this hostile crowd?

A If they would have got up and gone, we would have escorted them to the car just as we did some of the other picketers who did leave at a later time.

Q Escorted them to the car?

A Yes.

Q And by escorted them, what do you mean by escorted them to their car?

[fol. 153] A Walked them to their automobile and seen they would have gotten away from there without any trouble, because we did this with some of the other picketers.

Q You did this?

A Yes, we did.

Q When was this, sergeant?

A At the end. After the defendants were arrested and gone into the station in the wagon, there was a crowd still milling around and there were some of the picketers still carrying sign and my men and I, men on the detail and myself, walked some of them across the street. If you are familiar with that area there is Judge's Bar across the street. There was two picketers had their car parked on the side street.

* * * *

[fol. 154] Q Who was the first person according to you, sergeant, that asked the defendants to get up?

A I don't know whether it was I who was first or the lieutenant was first, sir.

Q Who made the decision to arrest these men?

A Well, as I said before, after we told them to get up for the third time I said if—

Q Not we—now excuse me—

A Excuse me.

Q Right.

A I said that if you don't get up and leave you will all be under arrest, you will all be arrested. At this point Lt. DiPino said "You are all under arrest".

Q Who said "Call the wagon"?

A It could have been any number of about ten police [fol. 155] men that were there around the circle. I imagine the lieutenant did. I didn't call.

Q How long did it take before the wagon arrived?

A The wagon was one block away. We had it stationed around the corner.

Q How was the wagon called?

A This I don't know, sir. I don't know whether they used radio to call them or one of the officers went up to the corner and called them. I don't know.

Q How long did it take for the wagon to arrive?

A Not very long.

Q How do you know the wagon was around the corner?

A We had it stationed there.

Q Why did you have it stationed there?

A In the event there was any trouble.

Q Isn't it a fact you called the wagon when the men were in the recruiting station. Is that not a fact that the wagon had already been called?

A No, sir. The wagon was stationed one block away throughout this demonstration.

Q How many wagons?

[fol. 156] A That I know of there was Cruising Patrol 5 which is a cruising patrol assigned to the Northern District and I believe C.P. 11, which is an emergency wagon.

Q You had two wagons?

A Well C.P. 11 doesn't normally transport prisoners. One wagon I know of transports prisoners, C.P. 5.

Q Was that cruising the area?

A Yes, just around the block. It was stationed up at the corner at the next intersection. I believe it would be 35th Street.

Q Isn't it a fact the wagon had been called by either you or the lieutenant when you were in the recruiting station?

. . . .

A Let me say this, counselor. Not by me.

[fol. 157] MR. WEISGAL:

Q All right. Now were there any police officers at any time holding on to any of these men while they were sitting in the circle?

A What time do you mean, prior to their arrest? While they were sitting in a circle?

Q While they were sitting in the circle?

A Holding them?

Q Yes?

A No, sir.

Q No police officer at all?

A No, sir.

Q After they were told they were under arrest, what happened? Did the police officers then go and hold them?

A After they were told they were under arrest, I would imagine, I don't remember, but I would imagine the police did hold on to them at that point, yes.

* * * *

[fol. 158] Q How were the men taken out of the recruiting center, sergeant?

A I believe I stated in my testimony yesterday that they were carried out by U.S. Marshalls and police officers.

Q By U.S. Marshalls and police officers? Each one by the same U.S. Marshall?

A No, sir, different Marshalls, different officers.

Q Different Marshalls and different officers. When you say carried out, does that mean they were carried, held by the arm and by the leg, one man on each side?

A I can only speak for the one I carried, Mr. Weisgal, and he was carried by his arms and legs.

Q When you got on the outside, sergeant, what did you do with them?

A He was deposited on the sidewalk.

Q When you say deposited, you mean you and the marshall then lowered him gently to the ground or did you drop him?

* * * *

[fol. 159] A He was placed down. Like I said I had him by the arm and leg. His legs entered the door first and the one that I carried was placed down on his feet and he didn't stand on his feet, he went right down to the pavement in a lying position.

MR. WEISGAL:

Q Now how quickly were the men removed from that office?

A How quickly?

Q Yes? How long did it take to remove all six of them?

A A minute or two, I would imagine.

Q All six were removed in that manner, is that correct?

A Again I say that is how I removed the one I carried, Mr. Weisgal.

[fol. 160] Q Do you remember whether you removed the first, second, third, fourth or fifth?

A Well I would have to say about the third one. Second or third.

Q Did you remove Harding, Green, Heimbach, Bachelor, or Rudman?

A I don't remember.

Q You remember their names perfectly.

A Certainly I do. I saw them three other times in court.

Q Three other times in court?

A That's right. Two postponements.

Q And one other time in the lockup?

A Yes, sir.

Q When you asked each one to stand up and face you so you could remember their names?

A I did that.

Q Right. Now the man that you deposited on the outside, can you remember whether there were two or three men before this or none?

A I really don't remember, Mr. Weisgal. I know there [fol. 161] were one or two there. It wasn't none.

Q But you didn't throw anybody out of that door, did you, sergeant?

A No, sir, I did not know throw anybody out.

Q You didn't drop the man?

A That I carried?

Q Yes?

A No, sir.

.

Q Did you see anybody throw any of the defendants or drop any of the defendants?

A No, sir.

* * *

[fol. 162] Q What did you do after—You say you placed him on the outside. Did you then go back into the recruiting center?

A Yes, sir.

[fol. 163] Q To do what?

A To see if I could be of any more assistance.

Q Were you of any more assistance?

A No, sir.

Q That's when you went outside?

A Yes, sir.

Q That's when the men were lying on the ground flat on their back?

A No, sir.

Q It wasn't? When was it?

A When the men were placed outside the door, this is when they laid on their back. I went back—In fact I never left—

* * *

A When they were placed outside on the sidewalk this is when they laid on the pavement. I went back to see if I could be of any more assistance. I could not and then [fol. 164] again returned to the sidewalk and the men were in a sitting position.

MR. WEISGAL:

Q Now its your testimony that you placed a man on his feet?

A I did not say on his feet. I said feet first.

Q Feet first? In other words, you put him down on and angle like this?

A Could have been.

* * *

Q Would you show us the angle on which you placed this man?

THE COURT: That I'll permit, if you can, sergeant? Can you?

A I don't think I can show the exact angle, your Honor, that I placed the man down. My man went down, he [fol. 165] didn't stand on his feet. He had all the opportunity but he did not.

MR. WEISGAL:

Q Sergeant, were you there the entire time from let's say—Let's change the question. What time did you arrive?

A Approximately 2:30.

Q Were there any pickets there then?

A No, sir, not at that time.

Q The pickets arrived at approximately what time?

A About three o'clock.

Q The picketers kept getting larger and larger all day, is that correct?

* * *

A It reached the point where there was about thirty to thirty-five, including women and children, and that was the—

MR. WEISGAL:

Q Were they all carrying signs?

[fol. 166] A I would have to say mostly all of them, except one woman who had two small children, one in a stroller.

* * *

Q You carried the man out of the recruiting office, is that correct?

A Yes, sir.

Q You and a marshall, is that correct?

A Yes, sir.

Q And there was one man holding his arm here,—rather you were holding an arm and a leg, is that correct, and a Marshall was holding an arm and a leg, is that correct?

A Yes, sir.

Q Now tell us how wide that door is at the recruit-[fol. 167] ing center?

* * *

THE COURT: Do you know how wide the door is, sergeant?

A By actual measurements, no, I don't.

* * *

[fol. 168] THE COURT: All right. Any redirect?

MR. LIPSON: No, your Honor, there is no redirect. At this point the State rests its case in chief.

* * * *

[fol. 169] (CONFERENCE IN JUDGE'S CHAMBERS)

THE COURT: Let the record show that counsel for the defendants has filed pleadings called "Motion for Judgment of Acquittal or for Dismissal of the Evidence". At the request of defense counsel the jury was excused. Counsel gathered with the Court in chambers, argument was had, the court has overruled the motion. I'll note the motion accordingly. Proceed with the trial. Call the jury.

* * * *

(JURY RETURNED TO THE COURTROOM)

* * * *

[fol. 170] DAVID HARDING,

* * * *

DIRECT EXAMINATION BY MR. WEISGAL:

Q Mr. Harding, where do you attend school?

A I attend school at Johns Hopkins University.

Q What year are you in?

A Sophomore.

* * * *

[fol. 171] Q You were one of the many pickets that went down to the recruiting center, on what's that date again, March 28th?

A That's correct.

Q When you arrived down at the recruiting office what exactly did you and the other six defendants do?

A Well I arrived at the recruiting center with the other five defendants at approximately 3 o'clock. I'd say between 3 and 3:15. There were a few other people already there with some picket signs. We joined them and started picketing in front of the recruiting center.

Q Let's stop for a second. Have you seen any of these pictures that were introduced in evidence?

A No, I haven't so far.

Q How long did the six of you join the picket line?

A We joined the people who were waiting in front of the recruitment center at that time and with them [fol. 172] started the picket line.

Q How long did you remain on this line?

A I would say approximately ten to fifteen minutes.

Q Then what did you and the other six defendants do, other five rather?

A The six of us left the picket line at that point and went into the recruiting center.

Q Then you had a discussion with the sergeant?

A Yes, sir. We brought with us certain pieces of literature, not the posters that were carried by the picketers. Other pieces of literature. We requested the recruiting sergeant who was in the recruiting center that he place these pieces of literature in the front window of the recruiting center along with other literature.

Q Will you describe what that is?

A Yes, sir. This is one of the pieces of literature that we brought in with us. I'm showing at this point to the recruiting sergeant and requested that he place it in the window. We told the recruiting sergeant—This isn't the only piece of literature I had, we had other things in addition to this. We mentioned to the recruiting sergeant if he had any objection to these specific [fol. 173] pieces of literature and pictures that we would be willing to come back with other pieces of literature and ask him if they would be all right in place of these we had brought in.

MR. WEISGAL: For the record, I am now showing the jury State's Exh. Number 7. If there is any one on the jury that wants to look at it again I can pass it around.

Q After the sergeant refused to place any of this literature around there, what did you then do?

A He refused and we proceeded to sit down in the chair. There were a number of chairs and there was a couch in the recruiting center.

Q Was there enough room for all of you to sit on the chairs and on the couch?

A Yes, there was.

Q Did any of you sit on the floor?

A No, we did not.

Q What happened at five o'clock or approximately five, around five o'clock?

A At approximately five o'clock the recruiting sergeant, who had been in the inner office, stepped out and [fol. 174] told us that he was going to close the recruiting center. The lights were turned off and the shades on the front window were put down. He asked us once again if we would leave. We said no. I personally said that I thought our most important business here— He came forward and said he had other business, that he had to do at that time, so he had to leave. I replied, I replied I thought our most important business was to remain in the recruiting officer at that time. At that point the Federal Marshall stepped forward with one or two deputies. They showed us their identification, asked us once again if we would leave. We refused and at that point the recruiting sergeant took Donald Bacheller's arm and started pulling him up from the seat he had been sitting in, toward the door. He got up and he was pushed out the door. After that police officers and Marshalls or Marshall's deputies came forward and picked up those of us who were still seated in the recruiting center, carried us to the door and threw us out.

Q You use the word threw you out?

A That's correct.

* * * *

[fol. 175] Q Just describe what happened to yourself, Mr. Harding?

A Well I was sitting on the couch in the recruiting center. I'm not positive whether it was deputies or Federal Marshalls or deputies or police officers, but at least two people picked me up from where I was sitting, carried me over to the door and threw me out the door.

Q How did you land?

A I landed on my butt, my rear.

Q Then what did you do?

A Well, I sort of, you know. I hit the sidewalk pretty hard. I sat up and other people were being thrown out

of the door after me and on top of me. I was hit by one or two people who had been thrown on top of me. As soon as everybody who had been in the recruiting center at that time was thrown out I attempted to get up. [fol. 176] I was worried that somebody had been hurt. I knew I had hit pretty hard and I was worried what had happened to the other people.

Q You say you attempted to get up?

A That's correct.

Q Then what happened?

A When I tried to get up there was a law enforcement officer of some sort, Federal Marshall or policeman, he was standing in back of me. When I attempted to stand up he pushed me down with his hands over my shoulder back down to the sidewalk.

* * *

Q Were you told at any time by either Sgt. DiCarlo or Lt. DiPino who testified here to get up?

* * *

A I was not told.

[fol. 177] MR. WEISGAL:

Q Are you sure?

A I am sure.

Q Were you at any time told that you were under arrest?

A No, sir. Just picked us up off the sidewalk and took us to the paddy wagon.

Q Mr. Harding, how would you describe the crowd at this time?

A It was large. When we had been thrown out of the door of the recruiting center, we were all essentially thrown into the picket line which had been covering the whole front of the recruiting center and naturally it disrupted the picket line. I mean we were thrown into it. In some cases behind people who had been picketing in front of the building. I know as a matter of fact one girl was hit in the head by a demonstrator who was being thrown out of the building. She was knocked down.

This disrupted the picket line. There were a large number of spectators who gathered in the immediate vicinity of the picket line. When the picket line stopped moving and broke up because people were thrown into the people [fol. 178] who had been on the picket line, the spectators who had gathered just sort of all moved in around those of us, the defendants who were on the sidewalk.

Q Did you see any soldiers or Marines there?

A Yes, I did.

Q Did you have any conversation with any Marines who were there?

A No, I did not.

Q Did he make any threatening gestures toward you?

* * * *

A No, he did not.

MR. WEISGAL:

Q Were you threatened by anyone in the crowd at any time?

A No, sir.

Q What was the crowd doing?

A Well many of the people in the crowd who were spectators were yelling "Bomb Hanoi", "Bomb Hanoi".

Q What were you doing. What were the picketers doing?

[fol. 179] A After we had been on the sidewalk for a brief period, we began singing "We Shall Overcome". There was a lot of noise.

Q Then you were carried across the street and placed in the paddy wagon, is that correct?

A That's correct.

Q Did you see the paddy wagon arrive?

A Yes, I believe I did.

Q What time did it arrive? How long had you been out on the pavement when it arrived?

A Oh, approximately, at a maximum of five minutes.

Q What was your purpose in going to the recruiting office with the other six men, going down to the recruiting officer and picketing in front of the recruiting office?

A Well the purpose of the entire demonstration was

to protest the United States involvement in the war in Viet Nam and by the six of us going to the recruiting center and requesting that literature, showing quite a different view of the war in Viet Nam than the literature already in the window that concerned the war in Viet Nam; by our action in doing that to illustrate the fact that the government is not publishing, giving the [fol. 180] public the full view of everything that is going on in Viet Nam.

* * * *

CROSS EXAMINATION BY MR. LIPSON:

Q How old are you, Mr. Harding?

A I'm 21.

Q Specifically, with regard to the last question that the government is not giving the full picture, how do you know this?

A Well, number one, because I read reports in the newspapers that are quite contradictory.

Q What do you mean by contradictory?

A Different points in time, different reasons for United States involvement in Viet Nam are articulated. Facts that seem to contradict each other are published by the government in different points in time. And then usually following that in many cases government officials claim there is no discrepancy between the different reports and they are entirely consistent—

Q You think these government officials are wrong?

[fol. 181] A I don't think the reports are consistent.

Q And based on this you are saying the American public, although it's in the newspaper, is not getting the full picture?

A Well that, in addition to the fact that I think many things are going on in Viet Nam that are not published in the major newspapers in the United States.

Q If they are not published, how do you know about them?

A Because I read other than the major newspapers in the United States.

Q What do you read?

A I read a number of publications that would be described as being on the left. I read many cases, books that the general public probably doesn't read, though they are available to the general public, by very respectable people. In many cases people who have acted as consultants for the U.S. Government.

Q Everything you read is something that has been published for general distribution?

A That's correct

[fol. 182] Q So it's available for the public?

A Yes, it is.

Q If the public wants to read it they can read it?

A Yes.

Q So obviously there are many other people than you who are aware of this alleged contradictory material, is that correct?

A Yes, who could be aware of it.

Q Who could be aware of it? So you held no big secret in your mind that the other people weren't allowed, didn't have the opportunity to know about, is that correct?

A No. I mean I believe if a person in the United States wants to find out as much as he can about what is going on in Viet Nam that there are a number of sources that he can turn to that can very well educate him about what is going on there.

Q Have you ever been in the Army?

A No, I haven't.

Q What did you think this recruiting sergeant could do in his position now?

A Well previous to going into the recruiting center [fol. 183] and speaking with the recruiting sergeant I had been unaware of the fact that he had no say whatsoever over what appeared in the window of the recruiting center. He informed us that this was so.

Q Well after he told you this, Mr. Harding, why did you persist in staying there and persist in attempting to get this literature in the window and on the walls?

A Because by our presence there I hoped and I think all of the defendants hoped, all of the people who had been picketing outside hoped that by our presence at that

recruiting center we would number one protest the war in Viet Nam, number two, illustrate that the government is not giving a completely full view of all that is going on there and that's why we remained there.

Q Even after you knew the sergeant had no authority to accomodate you, isn't that correct?

A That's correct.

Q And you were hoping that by parading around on 33rd street, one block, to influence the general public in the City of Baltimore as to your views?

A We had hoped that by picketing in front of the [fol. 184] recruiting center and by requesting that literature be placed in the window of the recruiting center that gave a different view of the war in Viet Nam than that that was already in the window of the recruiting center—

Q Even though you knew by government authority, by the U.S. Army authority, you had no right to do this?

A As I stated before, before I went into the recruiting center I was not aware of the fact that the recruiting sergeant had no authority whatsoever.

Q But you found out in no short order, didn't you?

A Yes, I did.

Q Yet you persisted in staying there for better than an hour, hour and a half perhaps, is that correct, and you would not leave until he gave you authority when you knew darn well he had no authority, isn't that correct?

A That's correct. We hoped that by our presence in the recruiting center that we could draw attention to the fact that there are people in this community who believed that the U.S. Government is not giving and objective or full view of what is going on in Viet Nam.

Q By being inside talking to the recruiting sergeant [fol. 185] you were attempting to change his mind about his views on Viet Nam?

A No.

Q Well who else? He's the only one in there, the only man with any authority in there?

A We spoke to the recruiting sergeant as I said when we first went in and on a couple of occasions for brief periods while we were in the recruiting center. I didn't really hope to change the recruiting sergeant's mind.

Q But you persisted in sitting there for an hour or so?

A That's correct. I'll state once again the entire purpose of picketing at the recruitment center and the presence of six of us in the recruiting center was to draw attention to the fact that we believed the U.S. Government is not giving a full and objective view of what is going on in Viet Nam.

Q Wasn't this the purpose, of pickets out front who could be seen by the general public riding by up and down Greenmount Avenue?

A The purpose of the pickets in front of the recruit- [fol. 186] ing center was to, number one, show the fact that there are people who are against U.S. Government in Viet Nam and, number two, that we feel that there are many facts that are not being widely distributed.

Q If the pickets were open to public view, and obviously you were not, because you were in there by yourself with the recruiting sergeant, what purpose could you serve to notify the public when nobody could see in there and probably nobody knew you were in there?

A Well it's clear that in order to illustrate—I mean in a sense this was a test.

Q Test of what? Nobody saw you in there?

A It was a test.

Q Besides your own pickets.

A It was a test in a sense that we were giving the opportunity in one way or another for an official of the U.S. Government to agree to put up literature expressing a different point of view.

Q When you full well knew he wasn't going to do it, he had no authority to do?

A I stated I don't know how many times.

[fol. 187] Q Mr. Harding, isn't it true that you persisted in this activity even though you knew that the sergeant couldn't do a thing for you specifically and solely because you and the rest of the group wanted to be arrested?

A No, sir.

Q Haven't you stated before that you wanted to be

arrested as a result of this activity so you could test your case?

A I never said that.

. . . .

Q When you were informed that the building was being closed at five o'clock, you did see the sign on the window that said 8:30 to 5?

A Yes, we saw that.

[fol. 188] Q You were informed at five that the place was closing for business. Why didn't you leave when you were told to leave?

A We hoped that by our continued presence in the recruiting center that we could draw attention of those people in the vicinity of the recruiting center and of the general public to the fact that we believed that the U.S. Government has not been giving the full or objective view of what's going on in Viet Nam regarding their involvement there.

. . . .

[fol. 189] Q What attention did you hope to gain by refusing to obey the U.S. Marshall, recruiting sergeant who had orders to close at 5 o'clock and who informed you either by word of mouth which he did and by sign on the door that the place was closing at 5—whose attention did you hope to gain by refusing to leave and having to be carried out?

A The people in the immediate vicinity of the recruiting center and general public.

[fol. 190] Q You are saying you hoped to gain publicity for your views, is that correct?

A That's correct.

Q Don't you feel it would have been better to go to the news media directly? Wouldn't you have gotten more publicity that way if that is what you wanted?

A There are different ways in which one can have his views, get into the news media.

. . . .

Q Whose views were you hoping to influence, those in the 3300 block of Greenmount Avenue?

A We hoped to influence the people of the 3300 block Greenmount Avenue and general public.

Q There are all stores there, aren't there?

A Well, I don't know. I know there is a number of stores.

* * * *

[fol. 191] Q Did you expect the recruiting sergeant to keep the place open because you insisted on staying there?

A I didn't know what to expect from the recruiting sergeant. I mean I really didn't know what to expect.

Q Which number were you put out on the sidewalk of the six?

A I believe I was second.

Q When you were put down, where did you land?

A I was thrown down.

Q You were thrown down? Isn't it true that your feet touched the ground first?

A No, that's not correct.

Q What happened when you were thrown down as you allege?

A I was thrown out.

Q What happened?

[fol. 192] A Well two law enforcement officials carried me to the door, they threw me out. I landed on my rear end on the sidewalk.

Q Were you injured?

A I had a sore rear end for a couple of days.

Q Did you have bruises on it?

A No.

Q Was it tender?

A Slightly.

Q Was it black and blue?

A No, it was not.

Q Did you require any hospitalization?

A No, I did not.

Q What position did you land in, a sitting or reclining position?

A Well sort of half way inbetween. I mean as they threw me I hit on my rear end. My feet were slightly up in the air. I wasn't completely horizontal and I wasn't vertical.

Q How long did it take you to assume the sitting position?

A Well immediately after I hit the sidewalk one or [fol. 193] two people landed on top of me.

Q Immediately landed on top of you? What did they land on?

A When I say immediately, I'd say within,—a maximum of five second intervals.

Q They were bombing you at five second intervals?

A People were landing on top of me at five second intervals.

Q What did you then do?

A As soon as I could I sat up.

Q How long was that?

A I would say at most fifteen seconds to half a minute.

Q These other people got up too, is that correct?

A What other people?

Q These other people that allegedly were thrown on top of you?

A They sat up, yes.

Q In what position on the sidewalk?

A Well I wasn't paying a lot of attention to them. I noticed that they did sit up. I was sitting with my [fol. 194] feet on the ground, my legs partially drawn up toward my body.

Q All right. When all six wound up on the sidewalk, relative to one another, would you describe the formation you were in, if there was a formation? Semi circle, straight line, rectangle?

A It wasn't in the shape of any normal geometric figure. We were irregularly located on the sidewalk.

Q You covered the whole sidewalk, correct?

A No.

Q What part of the—There were the six of you out there?

A That's true.

Q You weren't all line up against the building?

A No.

Q You had a sidewalk eight to ten feet wide. How much of the walk were you covering?

A Initially when most of us were thrown out there were spaces between us fairly wide. I don't know, at least in a number of case three or four feet. More people were close to the building than the curb.

Q There were some as far over as the curb, were [fol. 195] there not?

A I don't know. I didn't see. There were people closer to the curb than myself.

Q You didn't see, is that correct?

A I didn't notice anybody was actually right on the curb. There were people closer to the curb than myself.

Q You were facing in which way, toward the street or toward the building?

A Neither. I was facing approximately north, a little bit toward the street.

Q Who were you looking at?

A I was looking mainly at part of the crowd who had gathered and were standing there watching.

Q Why didn't you stand up?

A After I got to a sitting position the first thing I tried to do was stand up and I was restrained from doing that. I was pushed back down.

Q You were actually restrained from getting up?

A Yes, sir.

Q What was said to you by this alleged person who restrained you from getting up? Did he say sit?

[fol. 196] A He didn't—To the best of my recollection he said nothing.

Q He just held you down?

A That's correct.

Q Were they holding the other people down too?

A I don't know.

Q You don't know? Why not, you were right there with them?

A I said most of my attention was directed toward part of the crowd that had gathered and was standing around at that point.

Q You didn't see any of the other group, what happened to them?

A No. At the point where I was restrained I was

at that point looking at other people who had gathered around watching.

Q How were you restrained, describe the way physically, what action was used to restrain you as you say?

A A hand was placed on my shoulder. I was in a sitting position. A hand was placed on my shoulder. When I attempted to rise I was pushed back down.

[fol. 197] Q Who did this to you?

A Somebody standing in back of me.

Q You didn't see who it was?

A I didn't see specifically who it was.

Q Was it a member of the crowd?

A I don't believe so.

Q How do you know if you didn't see?

A The crowd was a slight distance back from where we were sitting.

Q Who was right behind you if you know I said?

A I said I don't know specifically.

Q It could have been one of your own pickets, is that correct?

A It's conceivable that it would have been one of my own pickets.

Q Who was holding you down?

A It was physically possible, yes.

Q Now the police were restraining this crowd from getting into you, were they not?

A Not the portion of the crowd I was looking at.

Q What was the crowd trying to do?

[fol. 198] A There was a mixture of pickets and spectators from that area, Greenmount Avenue, I presume mixed up and they were standing there and as I stated before a number of the spectators who had been a part of the crowd were chanting "Bomb Peking", "Bomb Hanoi", and a number of people who had been on the picket line, who were standing there, were singing "We Shall Overcome".

Q You were singing "We Shall Overcome" too, were you not?

A At one point, yes.

Q How many verses or choruses did you sing?

A I don't remember exactly.

Q How long did you sing?

A A minute or two.

Q Was this while the police were giving you orders to stand up?

A No, sir. I never heard any policemen give me or—I never heard any police officers give anybody else on the sidewalk orders to stand up.

Q Isn't it true you didn't want to hear this order because you didn't want to stand up and you did want to [fol. 199] get arrested?

A No, sir. I stated I tried to get up.

Q One of your own pickets held you back conceivably?

A It's conceivable from the point of view of physical—it's physically conceivable that the person who held me down on the sidewalk could have been one of my pickets. I just doubt very strongly whether a person who had come to that demonstration with me would hold me down to the sidewalk.

Q If he wanted you to be arrested and if he wanted to be arrested too?

A I just don't think that's what happened. I mean—I mean I can't,—it's conceivable from the point of view of distances involved and the fact that I didn't specifically see who was holding me down that it would have been one of my own pickets. But I just don't believe that would have been the case.

* * * *

[fol. 200] Q Did you see any other pickets being restrained by anybody else, from being able to get up off the sidewalk?

A No, I did not.

[fol. 201] Q Why, if you know, didn't they get up?

* * * *

A From what I saw at the time of the demonstration I don't know why the other witnesses didn't get up. I wasn't watching them all the time.

[fol. 202] Q MR. LIPSON: You have heard Sgt. Di-Carlo and Lt. DiPino testify that they were standing right alongside the group. Lt. DiPino testified that two

times he asked or ordered the group to stand and Sgt. DiCarlo three times, a total of five admonitions, warnings or requests to stand up. Are you saying this testimony of theirs is incorrect?

A I personally was never instructed to stand up.

Q You personally were not instructed to stand up?

A I never heard anyone instruct myself or anybody else sitting on the sidewalk to stand up.

Q Isn't this because you were singing and making noise because you didn't want to hear anything?

A No, sir. I think it's conceivable that, that at least one request to stand was given but due to the noise we didn't hear it. But I personally was never told to stand up and I never saw any of us requested to stand up.

Q What do you mean you never saw any of us requested to stand up?

A I never saw an officer come forward and ask us that.

Q You can only speak for yourself, is that correct?

[fol. 203] A I said I never saw an officer come forward and ask myself and I never saw an officer come forward and ask anybody else sitting on the sidewalk to get up.

Q They were standing right behind you, weren't they? Directly behind you?

A They were scattered all around.

Q Wasn't there a cordon of officers right behind you keeping the crowd off you?

A I didn't see directly behind me.

Q You don't know. Then you said you didn't pay a lot of attention to the other people in the group, is that correct?

A It depends on the point you are talking about. Like immediately after we were thrown out I looked around at the rest of the people who had been thrown out and attempted to stand. I gave up standing after I had been restrained. At that point I started looking at the crowd.

Q You weren't paying particular attention to the other five defendants, is that correct?

A I wasn't paying attention to them, no. Some of them were in field of view.

[fol. 204] Q You say it is conceivable this warning could have been given once. Is it conceivable it could have been given five times?

A Yes, it is.

Q With reference to this Marine you say you saw and the police testified was at least in the position or threatening to get at the group, you testified on direct that he didn't threaten you, is that correct?

A I don't believe—I don't believe the police officer described two Marines.

Q Yes.

A And from what they have said the Marine that I saw was not one of the two that they were describing.

Q So you don't know what the other Marine was doing or who if anybody he was threatening?

A I just saw one Marine, I guess within five or six feet of me, standing. And he was watching me, just looking at me.

Q How long were you on the pavement singing and doing whatever you were doing before you were carted away?

A At a maximum of five minutes.

. . . .

[fol. 205] Q Is it your testimony you were seated on the pavement for five minutes before you were arrested?

A I was on the sidewalk a maximum of five minutes before we were taken to the police wagon.

Q This is before a police officer came up to you and carried you away, is that correct?

A A maximum of five minutes before we were carried to the police wagon.

. . . .

[fol. 206] REDIRECT EXAMINATION BY MR. WEISGAL:

Q Now, David, did you hear any police officer tell you to get up?

. . . .

A No, I was not.

MR. WEISGAL:

Q What do you mean when you say it's conceivable that such an order could have been given?

A Well there was—As I said there was chanting going on on the part of the spectators who had gathered, and people who had been picketing, at one point we were singing and there was a lot of noise, and I think it is conceivable that an order or orders or request or requests that we leave the sidewalk might have been given but that we didn't hear them.

Q What do you really think, though?

[fol. 207] A Well I never was told directly to leave the sidewalk and I never saw a police officer give that order or make that request to anybody else that was on the sidewalk.

Q Now do you really believe it was one of the picketers that was holding you down?

. . . .

A No, I don't believe it was anybody who would have been in any way connected with the demonstration, who would come there to picket or any of the people who had gone inside the recruiting center.

Q Mr. Lipson told you that there were officers directly behind you, is that correct?

A He said, he intimated that there were officers.

Q I'm asking you is that correct?

[fol. 208] A I don't know whether there were officers directly behind me. I believe there was an officer standing directly behind me, but I mean as far as the crowd was concerned I don't know if they were in any way restraining the crowd.

Q It's also conceivable then, is it not, this officer could have been holding you?

A Yes, sir.

. . . .

[fol. 209] Q Was there any disposition on any part of the people in the crowd there as much as you could see to attack you or to do you bodily harm?

MR. LIPSON: Objection.

MR. WEISGAL: May we remove the word disposition and use the word attempt?

THE COURT: I'll overrule the objection to that.

A I saw no attempts to do us bodily harm.

MR. WEISAL:

Q Could any one of them gotten through and gotten you, anyone in the crowd if they wanted to?

* * *

A Yes, they could have, very easily.

* * *

RECROSS EXAMINATION BY MR. LIPSON:

Q How could they have gotten through to you?

[fol. 210] A Well, as I stated, there was a Marine standing within five or six feet of me and there was no police officer between myself and the Marine. There were other people, spectators who were standing within a few feet of me.

Q They were your own friends, were the fellow picketers, weren't they?

A No, they were not. These were spectators.

Q Weren't there police right around you?

A There were no police between myself and these spectators.

* * *

[fol. 211] Q You say restraint was imposed upon you, the person you are not sure of. How long was this restraint imposed upon you?

A I attempted to get up, just about as soon as I got to a sitting position, and I was just pushed down to the sidewalk. I attempted to rise. I, the first time I felt pressure on my shoulder. I mean the first time I didn't know exactly what was holding me down on the sidewalk. I was trying to get up but I couldn't rise. Then I pushed up again and I felt a hand on my shoulder pushed me back down.

Q So that is twice you tried that, is that right?

A In very quick succession.

[fol. 212] Q This was right after you were deposited on the sidewalk?

A Shortly thereafter.

Q Was this before or after the bodies were allegedly thrown on top of you?

A After.

Q What had happened to these other people that had been as you say thrown on top of you?

A They were sitting nearby.

Q You weren't observing them, is that correct?

A At different points I was observing them, other points I was not.

Q Now you made two quick attempts within a matter of seconds. Did you make any further attempts?

A No. I made an attempt to move in the direction of the building from the sidewalk.

Q Is that by crawling?

A No. I wasn't on my hands and knees, I was in a sitting—

Q Then you actually moved from your original position is that correct?

[fol. 213] A No, I was restrained from moving.

. . . .

Q You said you were on the sidewalk for a maximum of five minutes and that you made two quick attempts and no more attempts to get up, is that correct?

[fol. 214] A Yes, sir.

. . . .

FURTHER REDIRECT EXAMINATION BY MR. WEISGAL:

Q Did you or any of the five defendants at any time deliberately lie flat across that pavement?

A I did not.

Q Did you see whether any of the other defendants did?

A After we were able to, as soon as the other people were able to sit up they sat up.

. . . .

THE COURT: Let me ask the witness just one or two questions. What was your position at the time you [fol. 215] were singing? That has not been described.

A I was in a sitting position.

THE COURT: And in what fashion were you taken to the cruiser after the arrest?

A I was carried.

THE COURT: Is there any particular reason why you didn't walk?

A Well I mean the officers just came forward and picked us up and carried us to the police wagon.

THE COURT: Did you attempt to walk?

A No, I did not.

* * * *

FURTHER RECROSS EXAMINATION BY MR. LIPSON:

Q You have consistently, continuously testified that you did not pay particular attention to the whole group or any particular member of the group while you were there. Yet you testified that the others didn't lie across [fol. 216] the sidewalk either, is that correct?

A I didn't testify that I continuously did not pay particular attention to the group. I said, I think the record will show this, at times I looked at the demonstrators on the sidewalk and at other times I looked at the crowd.

Q So you can't of your own personal knowledge say that at no time did none of these people lie across the sidewalk, can you?

A It's conceivable while I was not looking at them some people were lying on the sidewalk.

* * * *

FURTHER REDIRECT EXAMINATION BY MR. WEISAL:

Q What do you mean by it's conceivable?

* * * *

[fol. 217] A It's physically possible. The people who, that I saw sitting on the sidewalk, I presume were capa-

ble of lying on the sidewalk if they wanted to do so. While I was not looking at them it's possible that they laid on the sidewalk, from the physical point of view. They were fully capable of it and they could certainly do it while I wasn't looking at them if they desired. I don't think they wanted to. For that reason I don't think it would have happened. But it is physically possible for them to have done that.

* * *

[fol. 218] Q Mr. Harding, did you call the Police prior to March 28th to inform them of the demonstration that was going to take place at 3328 Greenmount Avenue?

A Yes, I did.

Q How did you know who to call?

A I called up a police officer who I had met on occasion of a demonstration against discrimination in housing.

* * *

THE COURT: * * * You reported it before it happened?

A That's correct.

* * *

DANIEL RUDMAN,

* * *

[fol. 220] DIRECT EXAMINATION BY MR. WEISGAL:

* * *

Q Where do you attend school?

A I attend Johns Hopkins University.

Q You still attend Johns Hopkins?

A I just graduated this year.

* * *

[fol. 221] Q Mr. Rudman, you were one of the six men arrested as a result of the demonstration, is that correct?

A Yes, I was.

Q Now you also arrived at approximately what time?

A Approximately three o'clock.

Q How long would you estimate you were on the picket line?

A Approximately ten to fifteen minutes.

Q Then what did you do?

A Well after marching around for ten or fifteen minutes I entered the recruiting station with the other five defendants.

Q Did you participate in any of the requests for discussion in order to put up signs or posters?

A No. I remained quiet. There was one spokesman. I let them do most of the talking.

Q In other words, the rest of you just sat there and observed?

A Yes, sir.

Q Now directing your attention the,—you heard the U.S. Marshall ask you to leave, did you not?

[fol. 222] A Yes, I did.

Q You heard the sergeant ask you to leave, did you not?

A Yes, I did.

Q You did not leave?

A No, I did not.

Q Now, describe what happened after that?

A At approximately 5 o'clock the Marshall asked us to leave. We refused. First Mr. Bacheller was taken by a Marshall and officer toward the door. Then I was taken. The way we were taken, the way I was taken specifically, I was pulled up off the couch I was sitting on, taken by one man on each side of me, each taking my arm and leg, carrying me to the door and thrown out on to the pavement approximately four, five feet, three to five feet out in front of the recruiting station. I was thrown on to the sidewalk.

Q How did you land?

A I landed primarily on my back side but a little bit on my right, on the right side of my back side, partly on my thigh.

[fol. 223] Q What did you do then?

A Well all I did was gather myself together, just drew my legs a little closer. And what was happening immediately after I got out, the other boys were being thrown out right after me. Dave Harding was thrown out on the pavement and following him Allen Green was thrown out on the pavement and then Wayne. Precisely because it happened so rapidly, you know, I just had the chance to get myself together and observe what was happening to them right near me, being thrown out in front of the door. Should I continue with what happened?

Q I want to ask you this question. What happened to the pickets while you were thrown out?

A When we were thrown out the picket line was no longer able to move because we were actually thrown right into it. Therefor, as far as I could see, it stopped. It was no longer able to move around in a circle.

Q What happened to the crowd and pickets?

A Well the crowd and pickets were intermingled precisely because everyone had now started to bunch up around the area we were thrown out and there was [fol. 224] no separation of groups. It was not a separate picketing group and a separate passerby group. They were indistinguishable except for the fact the pickets had signs, some of them.

Q What did you do then?

A Now as soon as everyone was thrown out, for some reason, I don't know why, I was grabbed by the collar and pulled along the sidewalk toward the curb and left half on the curb and half off. More specifically my back side, part of my backside was left on the gutter and my legs were left on the sidewalk. Now immediately following then I was let go. So I attempted to just get back on the sidewalk. Now I sat on the sidewalk and then after gaining ahold of myself I tried to stand up. At this time, while I tried to stand up, the officer who had dragged me across the sidewalk now put his hands on my shoulder and prevented me from getting up. I struggled further to try to get up and he said "Down, down, down" and pressed on my shoulder, and remained holding me there for a certain amount of time which I

couldn't exactly say. Another minute probably. I thereupon remained there until I was carried bodily by two persons and thrown in the paddy wagon.

[fol. 225] Q Now did you hear any officer at any time tell you to get up?

A No, sir, I didn't.

Q Did you hear any officer at any time say to you, "All right fellows, get up and get out"?

A No, sir, I didn't.

Q Are you sure?

A Yes, I am.

Q Did you at any time hear the lieutenant tell you that you were under arrest?

A No, I did not.

Q Would you have been able to have heard him if he had made such a remark?

* * * *

A No. The lieutenant was never close enough to me to make—In other words, if he had made such a remark I would have heard him—I wouldn't have heard him because he was far away from me and the only policeman that was close enough to make such remark was [fol. 226] the policeman in back of me. The only thing he stated was "Down, down, down".

MR. WEISGAL:

Q You heard the sergeant testify he was in the middle of the crowd there, he asked all of you on three occasions to get up. Did you hear him ask you to get up?

A No, I did not.

Q Did you want to be arrested?

A I went to the recruiting station to protest the war in Viet Nam. I did not go there to be arrested. I realized there was a possibility of being arrested but I went there to protest the war in Viet Nam.

Q Incidentally, what was the crowd doing while all of you were on the pavement? Was the crowd making any remarks, any threatening, were they making any sounds or noise?

A The main sound there I heard was chanting "Bomb Hanoi, Bomb Hanoi".

Q Were you one of those that joined in singing "We Shall Overcome"?

A Yes, I did.

Q Would this have prevented you from having heard [fol. 227] any command?

A No, I don't think so.

Q While you were on the pavement were you at any time in fear of bodily harm from any of the onlookers?

A No, sir, I wasn't.

Q Did anyone in the crowd at any time threaten you or attempt to molest you?

A No, sir, no one did.

* * * *

CROSS EXAMINATION BY MR. LIPSON:

Q One interesting comment, Mr. Rudman. You remarked that you realize that there was a possibility of your being arrested. Would you explain that, please?

A Well on any demonstration that involves a protest, a political protest, there is always the possibility of being arrested.

Q For what?

A Excuse me?

Q For what?

[fol. 228] A Well, I don't know. But I have in the past been on demonstrations, civil rights demonstrations, depending upon the attitude of the police at the particular time, various charges have been made.

Q Isn't it for violations of the law that arrests are made?

A I couldn't answer the legal question. I don't know why.

* * * *

[fol. 229] Q Isn't it true that arrests are made for violations of the law?

* * * *

A Yes, arrests are made for violations of laws.

MR. LIPSON:

Q Did you go there anticipating to violate the law?

A No, I did not.

Q Why did you anticipate you might be arrested?

A I said I anticipated the possibility of being arrested. No matter what kind of demonstration I thought it might anticipate that possibility.

Q You possibly realized you might be doing something wrong?

A No, sir, I did not say that.

* * * *

[fol. 230] Q * * * How long were you sitting on the sidewalk after you were placed there by the police?

A From the time I was thrown out on to the pavement I would say until the time I was taken into the paddy wagon, I would say from three to five minutes.

Q This officer that allegedly restrained you from getting up, how many times did he restrain you?

A I tried to get up once he pushed me down. Then I tried to struggle further and he said "Down, down, down".

Q What is that officer's name?

A I stated previously that he grabbed me by the back and dragged me, so I only got a glimpse of him. I could [fol. 231] not really identify him.

Q Can you identify him as a police officer?

A Yes, I can.

Q You don't know his name?

A No, I don't.

Q Didn't you see him any time after? You were there three to five minutes?

A I said that he dragged me to the gutter, to the curb and gutter and stood behind me. When he pressed down on me he was behind me so I could never get a good look at his face.

Q In the three to five minutes you were never in a position to identify a man who dragged you as you say across the pavement? You were never concerned with knowing who this was?

A When a man has his hands on your shoulder it is very difficult to turn fully around and look at him in the face.

Q Did you say "ouch, you're hurting me", or "Stop that", or anything?

A I did not think that would do any good in view [fol. 232] of the fact I had tried to get up. He prevented me from doing so.

Q You never once tried to turn around and determine who he was?

A I tired but it's very difficult to turn around when someone is holding you down.

Q You said his hand was on your shoulder, is that correct?

A I said his hand was pressing down on my head.

Q There's no hand on your head or neck, is there?

A I said I got a glimpse of him. I said I could not identify him fully.

Q The officers were wearing their names, badges with names like they do today, were they not?

A I don't remember.

Q Weren't you given the opportunity to walk to the paddy wagon?

A No, sir, I wasn't.

Q You mean without asking they just picked you up and carried you over?

A Yes, sir.

[fol. 233] A Well it happened very very quickly. They picked me up—

Q The paddy wagon was across the street, was it not?

A Yes, sir.

Q Its across the width of Greenmount Avenue.

A Yes, sir.

Q At no time during this so called carrying did you say put me down, I'll cooperate, I'll walk with you?

A I said it happened very quickly. They picked me up, carried me very quickly to the paddy wagon.

Q Did they run with you?

A I wouldn't say run but very quickly, as quickly as they could in view of the fact they were carrying somebody.

Q You were on the sidewalk three to five minutes you say?

A Yes, sir.

Q After you were told by the recruiting sergeant and U.S. Marshall to leave, did you leave?

A No, sir.

Q Why not?

A I had come there to protest the war in View Nam. [fol. 234] I felt that staying there would be the best way to protest.

Q Didn't you know at that time you no longer had any authority to stay there?

A What do you mean by authority?

Q Didn't you know that U. S. Marshall, didn't he show you his badge and ask you to leave?

A Yes, he did.

Q Did you think he didn't have any authority to ask you to leave?

A No. I thought he was just what he said he was, a U. S. Marshall.

Q Did you or did you not think he had authority to ask you leave?

A Well if he was a Federal Marshall, which I accepted, I believed he had authority.

Q You disregarded, you went against his request and his orders to leave, is that correct?

A I said I would refuse to leave.

Q And you didn't leave, you had to be carried out, is that correct?

A Yes, sir.

[fol. 235] Q Even after the U. S. Marshall and recruiting sergeant, who you knew was closing the place, asked you to leave?

A Yes, sir.

Q Who was the spokesman of the group you mentioned?

A David Harding.

Q He did all the talking for the group? Did he arrange this demonstration?

A Did he arrange this demonstration?

Q Yes?

A No, he didn't.

Q Now you have heard Lt. DiPino and Sgt. DiCarlo testify they were standing right alongside of the group?

A Yes, sir.

Q And a total of five times one or the other of them said get up?

A Yes, sir.

Q Are you saying that they are not accurate in what they said or they are not telling the truth?

A I am not saying that. All I said I personally did not hear any officer tell, tell me I was arrested first, [fol. 236] or tell me that I should leave and get up. I did not hear either Sgt. DiCarlo or Lt. DiPino, that's all I can say.

Q Isn't it true it's not that you didn't hear, you didn't want to hear because you were anxious to continue this type of activity that you had been engaged in?

A No, it's not true. As I stated I was not permitted to get up because the officer was pressing his hand down on me. I tried to get up and I was not allowed to. I was never told that I had been arrested, I was never asked to get up.

Q Why did you try to get up if you weren't asked to get up?

A I was thrown out to the sidewalk bodily, I was dragged to the curb. I do not like being thrown out to the sidewalk or dragged to the curb, I would like to stand up. I thought it was quite irrational that I was thrown out and dragged.

Q You knew you were doing something wrong, weren't you? You were disobeying a U. S. Federal Marshall's order, were you not, on Federal property?

A Yes, sir.

. . . .

[fol. 237] Q Might not you have also been willing and anxious to disobey the order of the Baltimore City police officer by pretending not to hear?

A I can only repeat that I was not told at any time that I was to be arrested or that I should get up. I was not warned at any time.

Q Are you alleging then that Lt. DiPino and Sgt. DiCarlo did not say this?

A No, I'm not alleging that. I can only allege what I saw and what I heard.

Q Where was the lieutenant or sergeant standing with regard to you?

A I'm not certain. I would say that since I'm on the curb, he was closed to the others. I was further away. I was the furthestest away from the group.

[fol. 238] Q Then you saw him, is that correct?

A Yes, sir.

Q You saw both of them?

A The only one I remember is the lieutenant.

Q Did you see him talking to any other members of your group?

A I wasn't looking at them all the time but the time I was looking at him I did not see him—

Q You weren't looking at him all the time?

A No, sir, I did not.

Q Did you see, personally, other members of your group restrained from getting up to their feet?

A No I did not.

* * *

[fol. 239] Q Did you or anyone else in your presence anytime prior or subsequent to this date, March 28th, make the statement that you went there to be arrested and you wanted to be arrested?

A I never made that statement and I was not in the presence of anyone who did make that statement.

Q No one ever made it to you?

A No.

Q I specifically now call your attention to April 19th. You recall that date, April 19th?

A Yes, sir.

Q Did you happen to be in company with the other five defendants on that date?

A Yes, sir.

Q Did anyone of those or yourself make the statement on that date that you wanted to be arrested when asked [fol. 240] the question?

A To the best of my ability to remember I did not make that statement nor did I hear anyone else.

Q You're not sure of it?

A I said as far as I can remember.

Q As far as you can remember. With the position that all five or six of you were in on the sidewalk, the total group was blocking the sidewalk, were they not?

A No, sir, they were not.

Q They were not?

A I'd like to explain how they were.

* * * *

Q All right, please explain?

A I'd like to give a picture.

* * * *

A The sidewalk is approximately thirteen or four-[fol. 241] teen feet wide and we were thrown out of the door. No one was any further than about six feet when they landed in that group. Approximately six feet from the door or closer to the door. Now as I stated previously, I was dragged from that group to the curb and Mr. Bacheller was a little further in from the curb. So it was me, Mr. Bacheller a little further in and there was quite a space of about three feet and then there was the rest of the group and I think it was quite easy for the people to walk through the spaces.

MR. LIPSON:

Q Didn't you testify that the picketers stopped moving because of this introduction of foreign bodies into their group?

A I'm only speaking about the demonstrators, the six demonstrators, if they were blocking the sidewalk. I said there was plenty of room to walk through them. I did not make any statement as to the picketing. You're right, they were picketing and people who were—

Q The picketing stopped did it not because you were blocking the sidewalk, they could no longer picket?

A The picketing stopped because we were thrown [fol. 242] out bodily into the picket line.

Q After you were allegedly thrown, in this three to five minute period, did you make any effort to clear the

sidewalk so this group or any group could have free passage on that sidewalk?

A I don't—Did I make any effort?

Q Did you make any effort to get out of the way so there could be free passage on this sidewalk?

A As I stated previously, very shortly after I got out I was dragged to the curb by an officer and I was not allowed to stand up. Seems very difficult in that position to do anything else.

Q But you moved from that position you testified. You didn't stay, you moved over with your feet or your butt in the gutter as you testified. You left that position.

A I moved from being half in the gutter and half on the curb to all on the curb.

Q What position on the curb?

A Sitting.

Q Right alongside of the street?

A Right, yes.

[fol. 243] Q The officer let you move, did he not?

A He let me get onto the sidewalk and then put his hand on my shoulder, preventing me from standing up.

Q Did he prevent you from any further up on the sidewalk?

A Prevent? I don't understand.

Q In other words, you are saying that you are in a position ow on the curb—did you ever attempt to move from that position any other place?

A I attempted to stand up.

Q How about move, slide like. You were able to slide before?

A I never did slide before, I was dragged before.

Q How did you get back on the curb, did he drag you back on the curb?

A No, he permitted me to get back on the curb.

Q He permitted you?

A Yes, sir.

Q Did you ever try to move from that position to any other position?

A I tried to stand up.

[fol. 244] Q Besides standing up?

A No, I did not.

Q You heard people in that line say "Let us at them", did you not?

A No, sir, I did not.

Q You heard "Bomb Hanoi", but you never heard "Let us at them"?

A I didn't hear individuals speaking, I just heard some chanting "Bomb Hanoi".

* * * *

[fol. 245] REDIRECT EXAMINATION BY MR. WEISGAL:

Q Mr. Rudman, did you at any time see any of the officers attempt in any way to disperse the crowd that gathered?

A No, sir, I did not.

* * * *

MR. WEISGAL: Was it possible for people to walk [fol. 246] through you when you were on the sidewalk?

A Yes, sir. As I stated previously there was plenty of space for people to walk through.

* * * *

KIM MOODY,

* * * *

DIRECT EXAMINATION BY MR. WEISGAL:

* * * *

[fol. 247] Q Were you at the demonstration on March 28th?

A Yes, I was.

Q What time did you arrive there?

A I arrived at the demonstration at about twenty of five.

Q Twenty of five? Did you have a sign with you when you arrived there?

[fol. 248] A No, I didn't have a sign with me when I arrived.

Q Did you pick up a sign?

A I think—I think I got on the line and somebody gave me one when I got in line. I don't remember exactly.

Q And you were walking around carrying one of these signs? Were you carrying one of these signs?

A Yes, sir.

Q Incidentally where are you employed?

A I work at the Department of Welfare.

Q How long have you been working there?

A Nine months now.

Q And what are you, a case worker?

A Yes, sir.

Q Were you there when these men were—were you on the picket line when the six defendants were removed from the recruiting office?

A Well, yes, I was there. The picket line, however, was kind of becoming dispersed at that point.

* * *

[fol. 249] Q What happened to the picket line when the first man—Well let me ask you this question. How were the men brought out of the recruiting office?

A From where I was at the time that that happened I couldn't see them coming out. The line got dispersed at one point and I was more or less on the outside of the crowd that was assembling there, so I couldn't see them brought out of the recruiting center.

Q After these men were out of the recruiting center were you standing next to picketers or standing next to onlookers?

A I was standing next to both.

Q Now throughout that period were you afraid of any bodily harm?

* * *

[fol. 250] A No, I wasn't.

Q Did anyone make any threatening gestures to you?

A No, sir.

Q Did anyone try to grab the sign that you were carrying and take it away from you?

A No, sir.

Q What did you do after the six defendants were placed in the paddy wagon?

A After they were placed in the paddy wagon?

Q Yes?

A Well at that time the crowd and demonstration broke up and I left and walked home from there.

Q Now how close would you say you were to any of the defendants who were on the ground?

A Well it's hard to tell. I would say maybe around five or six feet. I'm not sure of that because I couldn't really see them.

Q Did you at any time hear any of the police officers tell any of these defendants to get up?

A No, I didn't.

Q Did you hear the police officers at any time tell [fol. 251] any of these men they were under arrest?

A I don't recall hearing that.

* * *

Q Did you hear any police officer giving any command to any of these six men with respect to getting up?

A No, I didn't.

Q Did you see any of the men when they were removed from the recruiting office?

* * *

[fol. 252] A I didn't see that.

* * *

CROSS EXAMINATION BY MR. LIPSON:

Q Mr. Moody, which one of these six defendants do you know personally?

A I know all six of them personally.

Q They are friends of yours, are they?

A Yes, sir.

Q How long have you known them?

A Well for different periods of time, some longer than others. The longest for about a little over two years.

Q You belong to any organizations with them?

A Yes, sir.

* * *

[fol. 253] Q Had you made prior arrangements with any of the six defendants to be at this particular demonstration?

A Well we had made organizational decisions. I don't

remember that any of the defendants personally asked me to come. In fact I think it was somebody else.

. . . .

Q Now once you're in this line around the six boys, when you were standing around this line facing the demonstrators who were on the ground, were there people standing behind you?

A I think so.

Q Any idea how many people were behind you?

A No.

Q Did you ever turn around to see what those people [fol. 254] were doing?

A I looked around the crowd. I don't know specifically whether I looked around or not. I looked around people that were around me.

Q There was a good sized gathering at that point, was there not?

A Yes, sir.

Q Is it safe to say then you weren't keeping your eye on every person in that crowd?

A Yes, sir.

Q You really don't know what they were doing either in the way of addressing the demonstrators by gesture, by talk or any other way? Do you?

A Only the ones that were right around me.

Q Right around you? How large a crowd would you estimate?

A Oh, there were fifteen to twenty people probably around where I was standing.

Q The total group that had gathered there on the sidewalk, how large was it if you can approximate?

A I would imagine that it was four or five times [fol. 255] that. Three or four times anyway.

Q You mean in the vicinity of 75, 80, maybe more people?

A I think so.

Q So it is safe to say then that you wouldn't necessarily know what each person was doing at any one time, is that correct?

A Yes, sir.

Q It's also safe to say that if any threatening gestures had been made toward these people you very conceivably could have missed it, is that correct?

A I could have missed some such gestures if any had been made toward me from people around me.

Q But you weren't laying on the ground, were you?

A No.

Q Now you stated that you were five to six feet from the closest of the people on the ground. How far were you from the furthest?

A Well it's hard to say because I couldn't really see. All I could see was sort of where the bunchup crowd ended and where there was kind of an empty space. A space of [fol. 256] about seven or eight feet, maybe more.

Q In addition to the five or six, is that correct?

A Yes, but at different times. I was trying to get closer to see what was going on.

Q You were moving around the crowd then, is that correct?

A I was moving in towards where the six defendants were.

Q And the policemen were standing all around there?

A There were policemen there, yes. They were standing.

Q So at sometime or another you were actually further from the group than this initial or original five to six feet, is that correct, from the first person?

A At sometime I was further than that.

Q Yes?

A Probably in the beginning I was further, when the crowd was first dispersed.

Q So you have now stated that the furthest one was perhaps another seven or eight feet away from the nearest one? You are now out to thirteen or fourteen feet [fol. 257] away, is that correct?

A Yes.

.

REDIRECT EXAMINATION BY MR. WEISGAL:

Q Mr. Moody, you say while you were standing in the crowd there were officers around?

A Yes, sir.

Q Did any of these officers at any time make any attempt to disperse the crowd?

A Not until the very end, until after the defendants were taken to the paddy wagon.

Q Had been placed in the paddy wagon, you didn't hear any command like that, di you?

A No, sir.

Q And incidentally, at all times you were still holding that sign, weren't you?

[fol. 258] A Yes, sir.

. . . .

[fol. 259] Q You were holding the sign protesting the war in Viet Nam?

A Yes, sir.

. . . .

Q There were no menacing gestures, threats or remarks made to you, were there?

A No, sir.

. . . .

RECROSS EXAMINATION BY MR. LIPSON:

Q Now among the people in the crowd there were quite a few of the picketers and demonstrators were there not?

A Yes, sir.

Q How many would you say intermingled among this general crowd that Mr. Weisgal refers to?

A Well I know that—that would be hard to say from [fol. 260] what I remember. But I know there were, I guess about forty-five, fifty pickets and at least as many people in the crowd. Perhaps more people in the crowd.

Q So in fact if an order had been directed to the group to disperse it would include some of the picketers, would it not?

A Yes.

. . . .

RICHARD GREEN,

. . . .

DIRECT EXAMINATION BY MR. WEISGAL:

Q Mr. Green, on March 28th you were one of the picketers up at 3328 Greenmount Avenue, is that correct?

A Yes, sir.

.

[fol. 261] Q I'm just going to limit your questions. After the defendants had been put out of the recruiting office what happened to the picket line?

A The picket line was broken up.

Q Now at that time did you, were you part of the circle that surrounded the picket line?

A Surrounded?

Q Surrounded the pickets?

A Yes, sir.

Q Did you have a sign?

A Yes, sir.

Q Did anyone threaten you?

A No.

Q Did anyone strike you?

A No.

Q Did you at any time hear any officers attempt to disperse the crowd?

A No, sir.

Q Did you at any time hear any of the officers tell—
How close were you to the closest picket?

A Ten to fifteen feet.

[fol. 262] Q How close were you to the closest officer?

A Approximately the same.

Q You were—Were you standing next to pickets or were you standing next to onlookers?

A Onlookers.

.

CROSS EXAMINATION BY MR. LIPSON:

Q Mr. Green, did you see these Marines?

A No.

Q You never saw the Marines?

A No, sir.

Q How old are you, Mr. Green?

A 17.

Q How far were you from the farthest picket?

A When I was watching the demonstrators?

Q Yes, the furthest demonstrator on the ground, I'm sorry?

A Twenty or twenty-five feet I think.

[fol. 263] Q Was this while the singing was going on too?

A Yes, sir.

Q You were never at any time told by police that you could not picket, is that correct?

A No, sir.

Q None of the other pickets were either, were they?

A No, they were not.

Q There was never any interference with your right to march around there carrying a sign?

A We were limited to the space in front of the recruiting station.

Q But they never told you you couldn't walk around, that you had to stop walking, is that correct?

A When the demonstrators were put out of the recruiting station we stopped, yes.

Q Then you were physically unable to, is that right?

Q We could have carried on the line. It would have been some ways away. There wasn't much point in carrying it on because this was—well the center of the demonstration, it changed to the form we were really just concerned with watching to see what happened then.

Q And the police were actually there overlooking the picketing, were they not?

A Yes, sir.

Q How long were you there before these boys were put out of the recruiting station?

A Between the time they were put out and the time—Oh, I see. I was there from about 3 o'clock until then.

Q That was near the beginning, was it not?

A Yes, I was.

Q You were there for about a period of two hours?

A Yes, sir.

Q And at no time did the police interfere at all with any of the picketing, is that correct?

A Yes, sir, that's correct.

REDIRECT EXAMINATION BY MR. WEISGAL:

Q In fact the picketing was very peaceful until these men were thrown out?

A Yes, sir.

[fol. 265] Q What happened then?

A Then the line broke up and—

Q Why did the line break up?

A Because—it broke up so the spectators—because we were interested in seeing what happened to the demonstrators. I suppose it was—it wasn't planned but, you know, we saw them thrown out and we wanted—well we were worried about their physical welfare.

Q I have no further questions.

* * * * *

MARY REARDON,

* * * * *

DIRECT EXAMINATION BY MR. WEISGAL:

Q Where do you go to school?

[fol. 266] A Notre Dame College. I just graduated.

* * * * *

Q On March 28th were you one of the picketers or demonstrators up at the recruiting center at Greenmount Avenue?

A Yes, I was.

Q What time did you arrive there?

A I got there about quarter of three.

Q About a quarter of three?

A Yes, sir.

Q How long did you picket or demonstrate?

A Until about ten after five.

Q What caused the picket line to stop?

A Well I really couldn't say what caused it to stop. We just decided to disperse after the six were arrested.

Q Prior to that, what happened? Did you see any of the men removed from the recruiting office?

A Well I didn't really see them removed, but I could see part of Dave Harding. I could see his arm or something and I heard them throw them onto the ground.

* * * * *

[fol. 267] Q What did you hear when Mr. Harding was removed?

* * *

A I heard Dave Harding being dropped or thrown onto the ground. It was then that I looked. At the same time I heard him, I looked. I knew it was Dave Harding because of the jacket he was wearing.

MR. WEISGAL:

Q You actually heard a noise?

A Yes.

[fol. 268] Q Now did you at any time hear any officer, any police officer tell any of these six defendants to get up off the ground?

A No, I didn't.

Q Did you hear any officer tell the six defendants they were under arrest?

A No.

Q Did you hear any officer at any time attempt to disperse the crowd?

A Before that, about—

Q I'm talking after, I'm talking about at that period after they had been—

A Oh, no, not at that period, no.

* * *

[fol. 269] MR. WEISGAL:

* * *

You heard no officer attempting to disperse the crowd, is that correct?

A That's correct.

Q Now, were you carrying a sign?

A Yes, I was.

Q What did the sign state?

A It said "Why is the U.S. in Viet Nam, really why?"

Q After these six defendants had been evicted were you standing in the—

MR. LIPSON: Objection.

MR. WEISGAL:

Q Where were you standing?

A I was standing on the grocery store side of the recruiting office, about the middle of the pavement.

Q Were you standing next to picketers or standing [fol. 270] next to onlookers?

A I really didn't see any picketers. I was standing next to the onlookers.

Q Did you still have the sign in your hand?

A Yes, I did.

Q Were you afraid of being injured?

A No.

Q Did anyone make any threats to you?

A Oh, no.

Q Did anyone curse you?

A No.

Q Did you hear anyone threaten any of the demonstrators?

A No, I didn't.

Q Who were on the ground?

A No.

Q What was the crowd doing?

A Well most of them were trying to get a look at the six demonstrators who were being thrown out.

* * * *

[fol. 271] CROSS EXAMINATION BY MR. LIPSON:

Q Miss Reardon, how old are you?

A I'm 23.

Q 23? Now when these gentlemen were put out, where were you standing with regard to them?

A I was facing them. I was standing on the grocery store side.

Q Were there people in front of you?

A Yes, sir.

Q Approximately how far were you from the closest of the demonstrators that were on the ground?

A I'd say about two yards.

Q Two yards? Six feet. How far were you from the furthest of the demonstrators?

A Well I couldn't see the furtherest one. The furtherest one, if he was at the recruiting station—

Q You say you were about two yards from the closest of the demonstrators that was on the ground?

A Right.

Q But there was people in front of you?

A Right.

[fol. 272] Q How many people would you say?

A I couldn't really estimate how many people but if you want to know the thickness, it was two people thick.

Q Two layers of people?

A Right.

Q Singing going on?

A Well, not right away. After a few minutes.

Q How long did they sit on the ground incidentally?

A It couldn't have been more than three minutes I don't think.

Q Did you ever see anybody keep them from getting up on their feet?

A I wasn't in a position to see that because I couldn't see. I could see between the crowd, that's the only reason I saw Harding.

Q You never saw any policeman holding them down and preventing them from getting up?

A I couldn't see that from where I was. There was people around all, around me.

Q But you saw policemen?

[fol. 273] A Well I saw them there and here in the crowd but I really didn't see the policemen who were throwing the six out.

Q I'm not talking about the policemen, as you say were throwing the six out. How about the policemen standing around in the crowd? This closest person you say was five to six feet away. Did you see anybody standing over him and keeping him from getting to his feet?

A I didn't notice any policeman at all because I really wasn't looking at that.

Q But there was singing going on?

A Yes, after a few minutes.

Q And these boys on the ground, were they singing too?

A I couldn't say, I don't know.

Q You couldn't tell whether they were talking or singing?

A No, I couldn't because I said I could only see Dave's arm.

Q You saw his jacket?

A His jacket, yes.

[fol. 274] Q Do you know Dave?

A Oh, yes.

Q You know the rest of the boys?

A Yes.

Q How long have you known any of them or all of them?

A About nine months.

Q The police at no time interfered with your right to picket there, did they?

A No.

Q They let you march back and forth as you pleased, is that correct?

A Yes, sir.

. . . .
MICHAEL KORT,
. . . .

[fol. 275] DIRECT EXAMINATION BY MR. WEIS-
GAL:

Q Are you a student at Hopkins?

A I graduate this week.

. . . .

Q Were you one of the participants in the demonstration on March 28th?

A Yes, sir.

Q What time did you arrive there?

A About three o'clock.

Q Was the demonstration peaceful and orderly?

A Yes, sir.

Q Did you see these six men, six defendants go into the recruiting station?

A I saw some of them go in. I saw some of them go in, not all of them.

Q You continued walking around while they were inside of the office, is that correct?

A Yes, I was walking around for part of the time.

Q Directing your attention to approximately five [fol. 276] o'clock, did anything unusual happen at that time?

A The defendants started coming out of the recruiting office.

Q You saw them coming out? In what way?

A They were being thrown out of the recruiting office forcibly.

Q What happened to the picket line while they were being thrown out?

A The picket line had to break because they were thrown into the middle of the line. It broke up.

Q Were you carrying a sign?

A No, I wasn't.

Q Were you distributing leaflets?

A Yes, I had been distributing leaflets to several spectators.

Q Were you going around throughout the crowd distributing leaflets?

A I had been talking with the crowd and distributing leaflets.

Q At any time did anyone threaten you?

A Nobody threatened me.

[fol. 277] Q Did anyone attempt to strike you?

A No, sir.

Q Did you at any time hear the police attempt to disperse the crowd?

A No, sir.

Q Did you hear the police give the six demonstrators any instructions whatsoever?

A No, sir.

Q In other words, they did not say get up off the ground?

A I didn't hear them say it.

Q Were you close enough to have heard them if such an instruction would have been given?

A There was a lot of noise at the time, I couldn't be sure. It was hard to hear anything.

* * * *

[fol. 278] Q How close were you to the closest police officer?

A At the time when the demonstrators were thrown out?

Q Yes?

A I wasn't very close to any of them. I was in the [fol. 279] middle of the crowd of people.

Q Then what did you do then?

A There was singing going on. I was singing.

Q What was the crowd doing?

A Some people—

Q The onlookers?

A Some of them were saying nothing, some of them were chanting "Bomb Hanoi". That was all that was going on.

Q You were standing next to picketers or onlookers?

A I was next to both. There were picketers and onlookers around me.

Q There was no threat to your safety, was there?

A There was no threat at all.

Q Did you see any officer going around and talking to the six defendants who were sitting on the pavement?

A No, I didn't see them. I didn't see any officer talking to any of the demonstrators.

Q Did you at any time hear—did you at any time see any of the defendants lying down on the ground?

A No. Every time I saw them they were sitting. Nobody was lying down.

* * * *

[fol. 280] CROSS EXAMINATION BY MR. LIPSON:

Q Now with regard to your last answer, that any time you saw them they were sitting up, obviously this infers there were times when you didn't see them, is that correct, because of the crowd?

A No, I was always watching one or another. I wasn't watching every demonstrator all of the time.

Q In other words, there were times when you didn't have your eye on any of them, is that correct, or some of them?

A There were times when I wasn't watching all six of them.

Q You can't honestly state what they were doing all during this period of time?

A No. It's just that every time I saw any of them they were sitting.

Q When with regard to the time they were placed on the sidewalk did you first see them, immediately?

[fol. 281] A I saw them getting ejected from the office. I saw them come out.

Q Your testimony is you never saw any police officer directly around them, is that correct?

A No, I said I didn't see any officers around me.

Q How about around them?

A There were officers standing around. I saw one officer whose hand, was holding Mr. Rudman.

Q Continually holding him?

A Yes, he had his hand on his shoulder.

Q Did he hold him down, restrain him?

A He had his hand on his shoulder.

Q Did you ever see Rudman prevented from getting to his feet?

A No, I just saw the officer with his hand on his shoulder.

Q Did you ever see any officer with their hand on any other shoulder?

A No, I didn't. At that point I was watching Mr. Rudman.

Q At that point?

[fol. 282] A Yes, sir. Well I didn't see any of the officers, I was concentrating on him.

Q There was a police officer around Rudman. You can't say you saw police officers around the others?

A No. There were police officers near the others but I wasn't watching that carefully.

Q What were the police officers—You weren't watching that carefully, is that what you said?

A I wasn't aware of the fact I was going to be testifying. Otherwise—

Q You weren't paying particular attention?

A No. I watched simply—I was not able to notice what was going on with all six of them at all times, it was impossible.

Q How close were you to the closest demonstrator?

A Oh, probably five or six feet.

Q And from the furthest demonstrator?

A Ten feet, maybe.

Q It was noisy?

A Yes, it was noisy.

Q You were singing?

[fol. 283] A Part of the time.

Q It's possible they could have been addressed by a police officer and you wouldn't have heard it, is that correct?

A It's possible.

Q But—

A But it didn't look it.

Q You just testified that you weren't paying that particular attention to everyone?

A No, it was impossible to do that.

Q Granted. How far were these boys separated from one another?

A They were fairly close to one another, within a few feet. So more close to the curb and some were in the middle of the sidewalk. They were spread out maybe over a distance of several feet.

Q Several? Almost the entire distance of the sidewalk?

A I'd say they covered about sixty percent of the sidewalk. At any one time. At that point the crowd covered the whole sidewalk. It was impossible to walk [fol. 284] through the crowd because it was ringed around the defendants.

Q That crowd consisted at least partially, maybe to a large extent, of picketers like yourself, is that right?

A They were partially picketers and partially onlookers. I'd say it was fairly even distribution. There was a lot of spectators around.

Q Where were you in the line with regard to people being in front of you?

A At the time of the picketing?

Q Yes?

A During most of the picketing I was giving out leaflets and talking with spectators.

Q I'm saying after the point they were put on the sidewalk where were you in that line that was ringing them as you stated?

A I was probably two or three feet deep from the end. But there was nobody particularly tall in front of me either. I could see fairly well.

Q You are friendly with all of these boys, are you not?

A Yes, sir.

[fol. 285] Q How long have you known them.

A Some of them four years, some between two and four years.

Q You have attended college with them, is that correct?

A Yes, sir.

* * * *

[fol. 286] Q The police allowed you to picket or hand out leaflets without bothering you, is that correct—didn't interfere with you in any way?

A No, they didn't interfere with me. I understand there was some difficulty on the line with being room for everybody.

Q Who is everybody?

A Well at times the line was a little bigger than the space that they wanted but I was following that. I was never interfered with. I was moving from point to point.

Q Where was Mr. Rudman sitting as you recall, Mr. Kort?

A He was fairly close to the curb.

Q Did you see him from the time he was taken out of the building?

A I saw him come out, saw him thrown out and then the next time I looked at him he was sitting and there was an officer with his hand on his shoulder.

[fol. 287] Q Did you at any time see Rudman attempt to crawl into the building, get back inside the building?

A I wasn't watching him all the time. As each person got thrown out I would look for the next one, and couldn't, didn't watch them as they hit the ground because I was waiting for the next person to come out.

Q With the exception of Rudman, did you at any time see any of those during the time that they were on the ground make any effort whatsoever to get on their feet?

A Well, when Mr. Harding was thrown out—

Q The question is did you see any of them make any effort to get on their feet?

* * *

A They weren't on the ground very long and since some of them landed pretty hard, in particular I noticed Mr. Harding and Mr. Heimbach, they looked kind of shaken—I noticed Mr. Harding in particular because his glasses had fallen off.

[fol. 288] MR. LIPSON: I don't think the answer is responsive at all. The question was, did you at any time see any of them make any effort to get on their feet?

A No, I did not.

Q They were on the ground how long?

A Probably three or four minutes. From the time the first one came out to the time they were carried to the wagon.

Q You testified—

MR. WEISGAL: From the time they came out to the time they were carried away, is that what you said?

A Yes.

* * *

Q You saw no one restrain these boys from getting [fol. 289] on their feet?

A No, I didn't. But I also—

* * *

RUST GILBERT,

* * *

[fol. 290] DIRECT EXAMINATION BY MR. WEIS-
GAL:

Q Mr. Gilbert how old are you?

A 20

Q Where are you employed?

A Union For Jobs or Income Now.

* * * *

[fol. 291] Q Now did you have occasion to be at this demonstration on March 28th at Greenmount Avenue?

[fol. 292] A Yes, sir.

Q Was it a peaceful demonstration?

A Yes, sir.

Q Was it an orderly demonstration?

A Yes, sir.

Q Directing your attention to sometime about five o'clock in the afternoon, did anything unusual happen?

A Well the demonstration broke up, because, well it was broken up by the police who stopped the picket line in order to take some people out of the recruiting station which was being picketed.

Q Were they taken out?

A One of them was pushed out, the rest were carried out.

Q And what happened to them when they were carried out?

A They were dumped into the middle of the sidewalk inside the ring of policemen.

Q How close were you to the demonstrators while they were on the sidewalk?

A Well I was only several feet from the closest demonstrator. The ring itself was about six or eight feet wide, so at the most I was maybe ten feet.

Q At any time did you hear any police officer tell them, tell these demonstrators to get up?

A No, I did not.

Q Did you ever hear them tell them they were under arrest?

A No, sir.

Q Did you at any time hear the police attempt to disperse the crowd?

A Not until they had taken all the people they arrested into the paddy wagon, and that was sometime after five o'clock. At no time during the demonstration did they try to disperse any crowd.

Q Where were the police standing with respect to the demonstrators who were on the ground, if you know?

A Well they were standing in a ring. There was some police standing in a ring around the demonstrators and there were other police, a few other police in the crowd.

Q Now were you carrying a sign?

A Yes, at one time. Several times.

[fol. 294] Q After the ring formed around the six men on the pavement, who were you standing next to?

A I was standing next to a police officer.

Q Did anyone in the crowd attempt to molest you at that time?

A No, sir.

Q Were you standing close to any of the onlookers?

A Very close, rubbing shoulders. We were all mixed in together, policemen, demonstrators and onlookers.

Q Were you saying "Bomb Hanoi", or "We Shall Overcome"?

A I believe I was singing "We Shall Overcome".

Q You think it would have been possible for you to have heard any orders given by the police?

A Yes, sir.

* * * *

CROSS EXAMINATION BY MR. LIPSON:

Q Mr. Gilbert, you know any of these six defendants?

A Yes, I know all of them.

[fol. 295] Q How long have you known them.

A A year and a half, two years.

Q How have you come to know them?

A Some of the demonstrators worked with me in different projects and I have worked with them on others.

Q How come you went to this demonstration on that day? Why did you go there?

A Because I wanted to participate in the demonstration.

Q Did any of these six defendants tell you about it or invite you to come?

A None of these gentlemen here I don't believe. Although I may have talked to them. I talked to several before the demonstration.

Q At no point did the police interfere with your right to picket around this place, did they?

A No, sir. The police let us go pretty much any way we wanted to in and out of the recruiting station, go through the line, across the street. They made no real attempt to—

Q I think you have answered my question. Thank you. [fol. 296] When you first saw these boys taken out, is it my understanding that you testified that they were placed in a ring?

A Well, no, sir. There was a ring of policemen. There was more a double line than a ring of policemen, on both sides of the demonstrators. The demonstrators themselves were just dropped on the sidewalk in sort of a pile.

Q Did they ever change their position from the time that they were dropped?

A Yes, sir. I saw in particular people move about on the ground.

THE COURT: I think the question is did they move upward or downward; did they do anything to get up?

A I don't think they could.

MR. LIPSON:

Q Well now, did they move at all

A Yes, sir. May I explain? I remember David Harding was carried out and dropped on the back sort of and he pulled his legs up in front of him a little bit and sort of twisted his position but he was, he sat on the ground I guess because the police officer had his hand on him.

Q Had his hand on him?

[fol. 297] A Yes, as I remember.

Q Where was the hand on him?

A On his shoulder.

Q How long did it stay there?

A I didn't—As I remember Mr. Harding was being restrained throughout. The policeman had his hand—

Q Throughout the entire what?

A Throughout the entire time I saw Mr. Harding, from the time he was dropped to the time I believe he was carried off.

Q How long was that?

A I would estimate that would be about five minutes.

Q But no one else, just Harding?

A No, I just talked about Harding. Mr. Harding is the individual I watched most during that period.

Q Is that to mean you weren't paying any particular attention to some or all of the others?

A Like I say, I couldn't watch everybody. I remember I watched Mr. Harding because he looked like he had been roughed up, you know, he was hurting from being dropped.

Q Is that what he looked like to you?

[fol. 298] A He had a pained expression.

Q A pained? Now how far back were you from the closest demonstrator?

A Well, a foot or so. I mean the police, we were all right up there with each other. The Police, the crowd and the people who had been picketing. And I was right up against one of the demonstrators, pretty close to one of the demonstrators. I was in a position where I could watch David.

Q But how many back? Were there two or three files or rows in front of you?

A No, there was—it was so close together that rows aren't really meaningful. We were all in there tightly together, sort of side by side.

Q What were you singing?

A "We Shall Overcome". But we didn't sing that throughout the entire demonstration.

Q Well during this three to five minute period that the boys were out front, how long did you sing "We Shall Overcome"?

A Not all of the time.

Q Did you sing other songs?

[fol. 299] A No, I don't think so.

Q There was considerable noise there?

A There was some noise, cars going by and people were talking and we had been singing.

Q I take it then since you had your attention specifically pointed to Mr. Harding, you mentioned you didn't pay too much attention to the other five—I take it this would mean you didn't pay that much attention to all or any of the police officers is that correct?

A Well, no, sir that's not—Would you repeat the question?

QL Let me rephrase it. How many police officers were there?

A At different times there were different numbers. I would have to say there were about twelve around the line, you know, sort of ring, double line.

Q You weren't paying attention to all twelve or anyone in particular, were you?

A I saw them there, that's all I can say.

Q But you weren't keeping your eye on all of them at the same time?

[fol. 300] A I couldn't do that.

Q You couldn't say whether or not they approached any of the group all during this three to five minute interval and said anything to them, could you?

A Well, it's possible while I was, you know, watching one demonstrator, that the policemen were talking to another demonstrator, but I watched—I was aware of what was going on. I had a sense of what was going on in the thing and I'm quite sure—

Q Why did you—

MR. WEISGAL: Let him finish the answer. You're quite sure what?

A I'm quite sure that no policeman made any effort to tell people to get up.

MR. LIPSON:

Q How are you so sure of this? You testified there was singing?

A Yes.

Q There was noise?

A Yes.

Q And you were paying particular attention to Harding [fol. 301] and not to the other five or twelve policemen? How are you so sure then? There were other people in the crowd, were there not?

A Yes, there were other people in the crowd.

Q How are you so sure?

A Well I'm sure because I was right up close to the demonstration and I was standing right behind one of the demonstrators and if a policeman had come and said to anybody, without reaching down and whispering in his ear something, I would have heard it. I really would.

Q But you weren't watching, you were paying particular attention to Harding?

A I was paying attention to Harding but I saw enough—Let me go back. When people were taken out of the station I watched each of them being carried out or pushed out or whatever. I watched the whole thing. It wasn't like, you know, it wasn't a spectacle. There were six people on the ground and there were a number of police officers with these people and it was something you could watch the whole thing, even though you might be struck with a particular individual. You might re- [fol. 302] member something particular about one demonstrator.

Q Where were these two Marines that were in the crowd?

A They were—I remember talking to two uniformed Armed Services people. I think one of them was Marine and one was an Army private because I had leaflets—I marched on the picket line and I talked to individuals, onlookers. I remember talking to a couple, like I say, uniformed members of the Armed Services about Viet Nam. We had a discussion.

Q What did the Marines say when you approached him?

A I don't remember if it was a Marine like I said. And I just remember that I had gave—this was earlier, this was during the picketing I'm talking about now. I remember handing leaflets to these two servicemen and talking to them about Viet Nam.

Q What was their respective response to your handing them a leaflet?

A Well they didn't really want to talk about it that much.

Q Did they say anything else?

[fol. 303] A I don't remember exactly what was said.

. . . .

All I remember he didn't want to discuss it. He took the leaflet. I don't remember exactly what he said. He wasn't happy about the demonstration.

MR. LIPSON:

Q What did he say?

A I don't remember exactly. General things about Communists and something.

Q What do you mean he wasn't happy about the demonstration?

A He didn't act like he was going to do anything. He didn't do anything but he didn't look happy about it.

Q Was he sad?

A No, he looke angry.

Q He looked angry?

A Yes, sir. But he didn't—I mean it was a controlled thing, you know, very controlled. He wasn't sure what was happening. This was something knew to him. I hope he went home and thought about it.

. . . .

THE COURT: Did the Marine say, I do not care to engage in discussion?

. . . .

A I don't remember if it was a Marine. I remember talking to a guy in a green uniform. He wasn't Army or he might have been a Marine. There were a couple of service men around who said they were service men.

MR. LIPSON:

Q Your freedom to picket was not in any way impaired, was it, during the whole course of the afternoon?

A No, we were allowed to picket throughout the afternoon. We were allowed to hand out leaflets.

Q The police were there during that time?

A I got there earlier.

Q What time did you get there?

[fol. 305] A I got there about fifteen minutes before the demonstration was supposed to begin.

Q What time was that, do you recall?

A 2:45 I'd say.

Q All during this time there were police there, is that correct?

A That's correct. There were police on the street and police sitting in cars on Greenmount Avenue.

Q They allowed you to picket in this area?

A Yes, sir.

. . . .

MR. WEISGAL: No further questions. That is the case for the Defense.

. . . .

[fol. 307]

June 13, 1966

. . . .

[fol. 318] THE COURT: Members of the Jury, the Court has granted the State's motion to put on one rebuttal witness.

. . . .

JOHN FOGARTY,

. . . .

DIRECT EXAMINATION BY MR. LIPSON:

Q Mr. Fogarty, how old are you?

[fol. 319] A 22.

Q What is your educational background?

A I graduated from the University of Baltimore.

Q What was your major there?

A Bachelor of Science in Marketing.

Q Are you employed?

A Yes. Baltimore News American.

Q What is your capacity with the Baltimore News American?

A I'm a reporter, mainly I cover police reporting. That's my main job. Also general assignments but most of it is police reporting.

Q I would ask you to try to keep your voice up. Mr. Fogarty, specifically now calling your attention to Monday March 28th, 1966, did you have occasion on that day to go to 3328 Greenmount Avenue?

A Yes, I did.

Q What was the purpose of your going there?

A At the time I was at the Southwest Station, the City Desk called and told me to go that address because there was a demonstration planned. We were notified [fol. 320] by phone apparently that there would be a demonstration protesting government policy in Viet Nam. Several college students, students from several colleges were suppose to put this demonstration on.

Q Did you go there with anyone or by yourself?

A I went by myself.

Q Did you meet anyone from the News American there at the time?

A There was Jim Lally of the photographers was there and another reporter from the News American but he was off. He stayed for a while and left. It was Toby Joyce.

Q Approximately what time did you arrived, Mr. Fogarty?

A About 2:30. It was a half hour before the demonstration started.

Q Calling your attention specifically to the period shortly before 5 p.m.—

A Yes.

Q —I'd like you to tell his Honor and the ladies and gentlemen of the jury what you observed at that time, if anything?

[fol. 321] A Approximately, I think it was almost exactly 5 p.m., the sergeant who was in charge of the recruiting station was closing. At that time there were six demonstrators who had been staging a sitin since about, I guess twenty after 3 or twenty-five after 3 when they finally went in and sat down. At this time U. S. Marshalls and some of the police officers carried the demonstrators out the front door and set them on the pavement.

Q Can you be more specific when you say sat them on the sidewalk? What was, what specifically do you mean?

A Well when they picked them up inside, I was outside the building when they came through the door. The police and marshalls were kind of bent over and they had them maybe this far off the ground. They didn't lift them very high.

MR. WEISGAL: Would you note for the record that indicates approximately a foot.

A I would say less than a foot. Maybe more likely they were just about clearing the ground when they brought them through the door.

MR. LIPSON: His hands have indicated a distance [fol. 322] of approximately six inches for the record.

A Right. When they got outside they bent over even further and set them, actually set them down on the pavement. They were not dropped, in other words.

Q On what part of their anatomy?

A On their rear.

Q You say they were not dropped?

A They were not.

Q In what formation, what order were they deposited on the sidewalk, if any?

A Didn't seem to be any formation. They were brought out and the first ones out were brought furthest away from the door and set down.

Q Did you at any time see any of the demonstrators thrown on top of one another?

A No. Actually they were not even really close to each other except two of them. There were two, the first two that were brought out were close to the curb and the other ones were scattered.

Q What happened from that time on, Mr. Fogarty, after they were put on the sidewalk?

[fol. 323] A Well they just sat there. The other demonstrators, who were outside picketing, had to stop, they couldn't walk by. The crowd started getting rather noisy when they were carried out and the police, all I could see was that one police sergeant, over there—

Q Do you know him by name?

A Sgt. DiCarlo.

Q You pointed to him in the courtroom?

A Right. I know him from the Northern District. I covered up there. He walked around and talked to several of them. I don't know if he talked to each one individually. I saw him talk to at least two. I couldn't hear what he was doing. You couldn't hear from where I was.

Q What happened then?

A Then I guess they were sitting there maybe about fifteen or twenty minutes.

Q You say fifteen or twenty minutes?

A At least because the police talked to them, the one sergeant anyway, and then he walked away and the other police were holding the crowd back and finally they got, some officer had picked one of the demonstrators up [fol. 324] and took him across the street to the cruising patrol when it pulled up.

Q Did you at any time see any of these gentlemen attempt to get up, any of the demonstrators?

A No.

Q Did you at any time see any police officer restrain any of the demonstrators from getting up?

A No. There were no police officers, other than when they brought them out, set them down. The only policemen I saw anywhere near them at that time was Sgt. DiCarlo. He was walking around talking to some of them.

Q After they were deposited on the sidewalk, what type of formation, if any, was formed on the sidewalk? Can you describe it?

A If anything it would be kind of a crude circle.

Q With regard to this circle, where were the six demonstrators?

A You mean—It wasn't a complete circle. There were a few here and so up in the upper corner and some, if I can remember over like the door of the building would be here. There would be a couple here and the [fol. 325] ones I remember most were down in front by the curb. There was an Army recruiting sign and they were some ten feet away from the Army recruiting sign.

Q You speak of the police officers restraining the crowd, is that correct?

A Right.

Q Where were the police officers with regard to this circle?

A Well they would be outside—The crowd was, the picketers stopped south of the building when the boys were sitting there. They couldn't walk by, so they stopped. So the picketers were here, the crowd was in front on Greenmount Avenue. Actually partially standing in the street. And then the other part of the crowd was north of them and the police were in front of the crowd between the demonstrators.

Q What if anything was the crowd doing at this time?

A At that time they were kind of jeering and calling the kids sitting there names. Every once in a while they started chanting, things like "Bomb Hanoi", "Bomb [fol. 326] Peking". They were pretty much—I think some of them were trying to spit at them, at the demonstrators. They weren't a very quiet crowd. They were, I wouldn't say a mean crowd but they were rather noisy, they were making all kinds of remarks.

Q You say the police were restraining them. What specifically do you mean by that?

A Well they had to line up. Not arm in arm but they had policemen spaced around separating the crowd from the demonstrators I guess * * *

* * *

Q Now with regard to the circle and the demonstrators, where were you located, Mr. Fogarty while this was going on?

A Two locations. First when they were bringing them out I was north of the building in the front row of the crowd. After they were brought out and set down I moved to the front of the building on Greenmount Avenue. I was shielding for one of the photographers.

Q How close were you to the demonstrators or any [fol. 327] one of them?

A To the two nearest the curb I was approximately ten feet.

Q Was anybody blocking your view?

A No, because I had to open the crowd for one of our photographers when they were ready. When the police picked the first one up I kind of elbowed my way in to let him get a shot. There was nobody in my way.

Q Now you have testified that you saw the police talking to at least two of the demonstrators. Did you overhear any conversation at all between the police and the demonstrators while you were here?

A No, it was impossible to hear.

Q You could not hear?

A No, because of the crowd. All I could see them was talking and making motions.

Q Are you talking about Sgt. DiCarlo?

A Yes, sir.

* * * *

[fol. 328] Q How much before the boys were carried away did this conversation take place?

A The conversation took place right after they were brought out, when he was walking around talking to them. So I guess they were sitting there, a good ten minutes after he talked to them. He might have talked to them the first five minutes moving around and then he just walked away.

Q How close was Sgt. DiCarlo from these people he was talking to when he was talking to them?

A Well, he would be—They had been sitting and he would like be standing at their feet and talking to them.

Q Were they looking at him?

A Some did, some didn't. I remember the two closest to me, when he walked over to them, they looked up at him. There were others that just looked down and never [fol. 329] looked up during the whole thing.

* * * *

CROSS EXAMINATION BY MR. WEISGAL:

Q Who is this man here?

A That's our court reporter for the News American.

Q A few seconds before this case started you were sitting here on the bench, is that correct?

A Yes, sir.

Q He came over and spoke to you?

A Yes, sir.

Q What did he say?

A Good morning to me.

Q He said Good morning to you?

A Yes.

Q What else did he say?

A Nothing.

Q I'm talking about two minutes ago?

A When he walked by me?

Q When he walked out of the judge's chambers, what did he say to you?

[fol. 330] A He said the judge has got to rule on whether or not you can testify.

Q He came out and told you that, is that correct?

A That's correct.

Q How did you happen to get in conversation with him, Mr. Fogarty?

A I was reading the paper Friday, there was a story about the case in the paper.

Q You were reading his story?

A I imagine it was his.

Q What happened then?

A He and I were discussing—I asked him if the case had been ended that day because the story was just, it didn't have any conclusion. I said, what happened? He said the case is still, it's held over until Monday. And then he told me that during the course of the day, this was not in the story—he didn't say who—but there was testimony given that the police had dropped demonstrators and had stopped them from getting up.

Q Did he tell you any other testimony?

A No. That was—He said also there was something [fol. 331] to the effect there was some type of testimony the police never said the boys were under arrest. But I told him I covered the story. As far as the police holding them down or police dropping them, it's not true.

Q He told you—

MR. LIPSON: Let him finish.

THE COURT: Mr. Weisgal, you interrupted. You asked him about the conversation. Let him finish.

MR. LIPSON: Continue, Mr. Fogarty.

A Go on with what we talked about Friday?

MR. LIPSON: Before you were interrupted.

MR. WEISGAL:

Q You were starting say there was, he told you about testimony—

A He told me—

Q That the police—

A Testimony the police were holding them down, they were dropped.

Q What else?

A I said to that, to those two points that I covered the story, that was not true because I saw it myself, [fol. 332] that the police didn't drop them.

Q You saw the whole thing?

A I was there the whole time. He also mentioned there was testimony to the effect that the police never told the demonstrators they were under arrest. I said I didn't know because I couldn't hear.

Q What else did he tell you.

A He just said to me, would you be willing to testify to that in court if they wanted you to. I said, sure.

Q What did he do?

A He called me later in the night that he had talked to the State's Attorney.

Q They wanted to do what?

A They wanted me to come here this morning.

Q And testify?

A Right.

Q And what was your other conversation with him?

A After that, that was it. I talked to him Friday night the last time until I saw him this morning. Then he told me the judge—First of all, when he came in this morning he said, Good morning, and when he came back [fol. 333] he said, after the conference in the room back there, he just said the judge has to rule on whether or not I could testify. He didn't say why.

Q Could you tell me who was the first of these demonstrators that was evicted if you were watching this whole thing?

A I would think it's the boy in the blue shirt.

(A juror asked "What was defense counsel's question?")

THE COURT: Repeat your question. You dropped your voice.

MR. WEISGAL:

Q Who was the first person to be evicted?

A To the best of my knowledge the boy in the blue shirt. He was the one who was closest down on the curb. Of course they all got haircuts too, they have changed quite a bit in the last two months.

* * * *

[fol. 337] Q What happened to the picket line after the men were evicted?

A When they were sitting on the pavement?

Q That's correct.

A It stopped.

Q Where were you at that point?

A At the time they were evicted I was north of the building, on the pavement.

* * * *

[fol. 338] Q You were there the entire time, is that correct? You so testified?

A That's true. I was there before it started.

Q You were there before it started and you were there until the very end?

A Right. I left at the same time the other demonstrators broke up.

* * * *

[fol. 342] Q Where do you think you were approximately 5:05 Mr. Fogarty?

A I think I was probably north of the building.

Q You were north of the building?

A Right where the glass ends. I would have been —there is another store. I was up by that wall.

* * *

[fol. 343] Q Where were you standing when the first demonstrator was brought out of the building?

A North of the building.

Q Still north of the building? Where were you when the second demonstrator was brought out of the building?

A Still north of the building.

Q The third?

A At that time, about that time I started to move.

Q Where did you move then?

A Down toward the front of the building.

Q You just testified before that you were right in front of the building because you were going to push through the crowd to make way for a photographer to [fol. 344] take a picture?

MR. LIPSON: Object, your Honor.

A No.

* * *

Q Approximately what time was the first defendant brought out of the recruiting center?

A Approximately 5 p.m., a little after 5. A minute or two after.

Q You were north of the building, is that correct?

A Yes, to the best of my knowledge.

* * *

MR. WEISGAL: State's Exhibit Number 9, your [fol. 345] Honor.

* * *

[fol. 346] Q Does this accurately depict the crowd that was in front of the recruiting station when these men were being evicted?

A Well there was more a crowd back here.

Q More of a crowd where?

A Out of the picture.

Q In the street?

A Yes.

Q Where were you standing?

A I don't know where I was standing when this picture was taken.

* * * *

[fol. 347] Q Now you say the demonstrators sat out on the pavement for at least fifteen to twenty minutes?

[fol. 348] A At least fifteen.

* * * *

Q What was the conduct of the demonstrators or pickets on the outside prior to these six defendants being evicted from the building?

A They were picketing, marching around.

Q Was it quiet?

A The demonstrators were quiet.

[fol. 349] Q Was it orderly?

A Yes.

Q Now you say you saw all six of the men carried out of the recruiting center?

A I cannot actually say I saw all six.

Q How many would you say you saw?

A Four.

Q You saw four of them carried out?

A Yes, sir.

Q According to you the highest that anyone was dropped was from this—

A I didn't say anybody was dropped.

Q No one was dropped? In other words, they were carried approximately this high off the pavement?

A Approximately six inches when they were brought through that door on out to the street.

Q You were close enough throughout this entire time to see these four men at least brought out of the building, is that correct?

A Yes.

* * * *

[fol. 350] Q Mr. Fogarty, at any time did you hear
[fol. 351] the officers attempt to disperse the people who gathered around to watch the demonstrators who were sitting on the pavement?

A They tried to keep the crowd moving earlier but at the actual time the demonstrators were sitting down I did not hear any of that, no.

Q Now did you hear any of the demonstrators use any obscene language or make any uncalled for remarks? I'm talking about these six specifically?

A Those six specifically? As far as I can see, when they were sitting down, they did not say anything.

Q You say the crowd was jeering and calling names and they were trying to spit at the demonstrators?

A That's correct.

Q Did you see any officers try to move those people away?

A They tried to keep them back. As I said before earlier they were trying to keep them moving.

Q I'm talking about after they had been taken out?

A When they were sitting there they tried to keep the crowd back.

Q Did anybody try to bust through?

[fol. 352] A Not that I saw, no. I mean the people, like at the back of the crowd would be pushing to see what was going on up front and you could feel it from the back.

Q You could feel it? Where were you at this time?

A At the time right before they were removed I was right in front of the station.

Q Were right in front? Who was pushing you?

A People that were behind, the people who had come like from across the street.

Q What were they trying to do?

A They were trying to see what was going on, I guess.

. . . .

REDIRECT EXAMINATION BY MR. LIPSON:

Q You mentioned north of the building as your position several occasions?

A Right.

Q How far away from the picketers or the people sitting on the ground is this north of the building as you [fol. 353] described?

A Where I was was maybe about two or three feet away from the end of the window. They have a big,

there's a big plate glass window and I was like two or three feet north of that and my distance from the demonstrators, from the door, would had to be at least I guess it would be five or six steps that you have to take. Even more than that, probably more than that, seven or eight steps.

Q When you say north of the building—

A I was right at the end of the building.

Q The recruiting building?

A Right, that's correct.

* * *

RECROSS EXAMINATION BY MR. WEISGAL:

* * *

[fol. 354] Q What time did the paddy wagon arrive.

* * *

A I didn't actually look at my watch at the time. I can give you a rough estimate.

MR. WEISGAL:

Q Approximately?

A Between quarter after five and 5:20. That's why I said earlier it was fifteen to twenty minutes they were actually sitting there because I do know when I left the scene it was twenty-five after five because I looked at my watch, I had to go back in the office.

* * *

[fol. 355] Q Did you hear Lt. DiPino tell these men they were under arrest?

[fol. 356] A I couldn't hear anything that the police said.

Q You know Lt. DiPino, is that correct?

A When I see him. I don't know his personally other than to say hi to him.

Q Incidentally, when they were first brought out of the station, would you say you were up front so you could view everything properly?

A No. When they were first brought out of the station I was not in front of the door, no. I was at the north edge of the building.

Q You were at the north end of the building. Did you start breaking through in order to get to watch, to see what was going on?

A No. I came around and then went up.

Q You came around? In other words you went out into the street?

A No, no, walked straight down and make like a ninety degree turn.

Q In other words, you were up here approximately? How far up the street were you?

A When they were first carried out?
[fol. 357] Q Yes?

A Approximately where this Waverly Laundromat is, right there. This is not when they were first brought out.

* * *

Q Anyway, when they were brought out, the pickets were still moving around the line, is that correct?

A To the best of my knowledge when the first demonstrator was brought out the pickets stopped.

* * *

MR. WEISGAL: No further questions.
[fol. 358] MR. LIPSON: Thank you, Mr. Fogarty. That would be the State's rebuttal, your Honor.

* * *

WAYNE HEIMBACH,

* * *

[fol. 359] DIRECT EXAMINATION BY MR. WEISGAL:

Q Are you a student at Hopkins?

A Yes, sir.

* * *

Q What year are you in at Hopkins?

A Junior, Third year.

* * *

Q Wayne, when you were taken out of the recruiting office, who many of the other defendants were outside at this time?

A All five.

Q How many were taken out?

A I was picked up bodily and taken to the door, a little bit past the door, and thrown to the ground.

Q What happened then?

A Well there were some legs I did land on, somebody's legs, I don't know who. Just laying around. When I hit the ground I laid out flat about two or three seconds trying to compose myself. As soon as I did compose myself I sat up, looked around a little bit and pretty soon after that we were picked up and taken to the wagon across the street.

Q How long would you say you were sitting out there on the pavement, the longest?

A The longest, I would say three or four minutes at the longest.

* * * *

[fol. 361] CROSS EXAMINATION BY MR. LIPSON:

Q Why were you picked up bodily, Mr. Heimbach?

A I don't know.

* * * *

Q Isn't it true, Mr. Heimbach, that the reason you were picked up bodily from inside the recruiting office is because you refused to leave at the request of the recruiting sergeant and at the request of the U.S. Marshall and later the order of—

A Yes, that's true.

Q No further questions.

MR. WEISGAL: That would conclude the case for the Defense. The rest of the testimony would be cumulative.

* * * *

[fol. 362] (BENCH CONFERENCE)

MR. WEISGAL: I'd like to renew my motions for a judgment of acquittal.

THE COURT: Motion is overruled.

MR. WEISGAL: I'd like to note for the record that on Friday afternoon, in the Judge's chambers, we discussed requests for instructions. The Judge was given

a complete set of requests for instructions by Defense counsel. The Judge at that time refused all of the Defendant's requests for instructions with the exception of one, I believe, which reads as follows:

THE COURT: I am going to tell the jury that dis-[fol. 363] orderly conduct, with which they are charged, does not relate to anything that took place inside of the office. They are not charged with being disorderly there, which in effect is what you are asking on that charge.

MR. WEISGAL: That is correct. I would like to also point out this in effect deprives the defendants of procedural due process in that the law with respect to disorderly conduct is so vague, so indefinite, that there comes, it becomes impossible for defense counsel, without knowing what the Court's instructions are going to be, to properly argue to the jury.

THE COURT: I'll tell you right now, Mr. Weisgal. I don't think the law as to disorderly conduct is as vague as you would have the record make it appear to be. Disorderly conduct I think is clearly defined in the recent case of *Drews v. State*, which is controlling on this point. I intend to tell the jury that disorderly conduct is the doing or saying or both of that which offends, disturbs, incites or tends to incite a number of people gathered in the same area. It is conduct of such a nature as to affect the peace and quiet of persons who may witness it and who may be disturbed or provoked to resentment [fol. 364] because of it. A refusal to obey a policeman's command to move on, not to do say may endanger the public peace may amount to disorderly conduct.

Now you know what the definition is. It is not binding upon the jury under our law, purely advisory. Anything else you want for the record? Prepare to go the jury.

. . . .

[fol. 374] THE COURT: Members of the Jury, my charge to you in these cases will be rather brief. As all or most of you at least know under the constitution and laws of the State of Maryland the jury in the trial of a criminal case is the judge of both the law and the facts. Anything the Court may say to you about the

law is purely advisory. It is intended to be of some help to you but you are at liberty to reject the Court's advise on the law, to arrive at your own independent conclusions of the law if you decide to do so. Likewise, if I should make any comment on the facts, you are not bound by such comment in any respect. It is your function to pass upon the truth of the testimony as given by the various witnesses and the weight to be given their testimony. However, it is the duty of the Court in a criminal case to advise the jury on the law whenever such a request is made by counsel for either the State or the Defense. There has been such request in this case.

[fol. 375] Now there will be no indictment or other papers to be taken with you to the jury room. I simply invite your attention to the fact that each of the six defendants on trial before you today is charged with the the crime known as disorderly conduct. Therefor it becomes necessary that I advise you as to what is meant by disorderly conduct.

At common law there was no offense known by that term. In more recent times, however, the charge is contained in a statute known as Section 123 of Article 27 of the Maryland Annotated Code. The essential parts of this statute I will now read to you.

"Every person who shall be found acting in a disorderly manner to the disturbance of the public peace upon any public street or highway in any city, town or county in this state shall be deemed guilty of a misdemeanor".

That misdemeanor is known as disorderly conduct. In further amplification of the meaning of the charge, I instruct you that disorderly conduct is the doing or saying or both of that which offends, disturbs, incites or tends to incite a number of people gathered in the same [fol. 376] (Cont'd) area. It is conduct of such nature as to affect the peace and quiet of persons who may witness it and who may be disturbed or provoked to resentment because of it. A refusal to obey a policeman's command to move on when not to do so may en-

danger the public peace, may amount to disorderly conduct.

Now the facts in the case are to a great extent not in dispute. The six defendants apparently by prearrangement had decided to stage a demonstration and to go inside the recruiting office of the U.S. Army at 3328 Greenmount Avenue in Baltimore City. They arrived at the scene I believe somewhere around 3:15 or 3:20 in the afternoon of March 28th, this year. Apparently David Harding, one of the defendants was to be spokesman and the other five, as far as I recall the evidence, remained silent. The six walked into the recruiting station carrying signs or what they described as literature and requested Sgt. Grumley, the officer in charge, to allow them to place these posters in the window. I think there was also some reference to placing them or some of them on the walls of the recruiting station. Of course the recruiting station is a place where the U.S. Army invites [fol. 377] young men, sometimes older men, to come to volunteer their services for duty in the armed forces. The sergeant, under the regulations, could not permit this request of the defendants to be granted and he so informed them. They then proceeded to sit down or take their positions inside the recruiting station until it came time to close. In the meanwhile the sergeant called in, and the United States Marshall, Mr. Udoff, came out to the scene along with one or more of his deputies. At about five o'clock the office was being closed and the defendants were asked to leave. They refused. Thereupon, Mr. Udoff, the Marshall, called upon the police officers outside to assist him. I believe he said he deputized them temporary U.S. Marshalls and they proceeded to remove these six defendants from inside the recruiting station. There is some conflict as to the manner of removal but it is agreed that each of the defendants was carried out. Whether they were thrown out to the sidewalk or carried out and laid down there is open to some dispute. The fact is all six of them either lay down or sat down on the sidewalk outside the recruiting station and remained there. I believe it was said they did get to a sitting position but they did not

[fol. 378] get up. There is some dispute as to the testimony of two of the defendants who said that a police officer had his hand on the shoulder of one or two of them, but the fact is they did not get up but sat there singing.

After some interval of time the police officers, according to them, told them to get up and move on. The crowd which had already assembled outside was increasing and the police officers said they were apprehensive over the possibility of a serious public disturbance. That is the testimony of the State. At any rate these young men did not get up after being told, according to the State's witnesses. Upon their refusal to obey, the police called the cruising patrol, which arrived not long afterwards and the police officers then proceeded to pick them up once more and carry them across Greenmount Ave. to the cruising wagon, after having told them, according to the officer, that they were under arrest.

Now the defense in the case, as I understand it, is that the defendants take the position that they did not hear the command of the officers to get up and move along. If that is the case they had a right to sit on the sidewalk or in the case of one or two of them re-[fol. 379] strained there by the hand of the officer. That of course is for you to judge. The defendants contend that the police officers should have dispersed the large crowd rather than disperse the six individuals whose conduct had attracted the crowd in the first place. That is the issue for you to decide, whether they were acting in a disorderly manner.

If you find that they were beyond a reasonable doubt and to a moral certainty, then you should find each one of them guilty. If you find they were not acting in a disorderly manner, if there exists a reasonable doubt in the mind of anyone of you as to whether they were, in either of those events you should find the defendants not guilty.

You should not assume that the accused or any of them are guilty merely because they are being prosecuted or because criminal charges have been brought against them. The defendants come into court presumed to be

innocent and that presumption of innocence attends them throughout the trial. The State has the burden of proof that each of them is guilty beyond a reasonable doubt and to a moral certainty. This does not mean that the State has the burden of proving to a mathematical certainty that the defendants or any one of them are guilty [fol. 380] or that there is no possibility beyond the evidence than that of guilt. If the evidence is of such a character as to persuade the jury of the truth of each charge, that is to say of the charge against each defendant, with the same force that would be sufficient to persuade a member of the jury to act upon that conviction of truth in his or her own important business affairs or important affairs in his or her own life or career, then the jury may conclude that the State has met the burden of proof beyond a reasonable doubt and to a moral certainty.

You have the duty in a criminal case to determine the facts, pass upon the credibility of the witnesses, determine what evidence is reliable and trustworthy and what evidence ought to be disregarded as mistaken or unreliable. You are the judges of the law as I have told you before. It is likewise true that you have the ultimate responsibility for the determination of the issues in these cases with fairness to both the State and the accused.

Now your verdicts will be either guilty or not guilty as you determine to be proper. Your verdicts must be the unanimous verdict of all twelve members of the jury. [fol. 381] When you have agreed upon the verdict as to each of the defendants you follow the same procedure I know you adopted before, simply let the foreman tap on the door and inform the clerk or bailiff who will greet him merely that you have agreed. The foreman will not let it be known or intimate in any way at that time what the verdicts are for the verdicts have to be received for the first time in open court.

Counsel, you are invited to come to the bench to take whatever exceptions you care to the charge.

(BENCH CONFERENCE)

THE COURT: First the State.

MR. LIPSON: The State has no exceptions to the instructions.

THE COURT: Mr. Weisgal?

MR. WEISGAL: I except to the definition of disorderly conduct in that it is vague and abrogates the defendants' rights as guaranteed by the First and Fourteenth Amendments, of the United States Constitution. My second exception that the Court told me he would instruct the jury that conduct within the recruiting center is not to be considered by them as disorderly conduct. [fol. 382] There was no such instruction made.

* * * *

[fol. 384] THE COURT: Members of the Jury, you will now retire to consider your verdicts.

* * * *

[fol. 386] THE COURT: Take the verdicts.

THE CLERK: Donald Bacheller, Allan Green, Wayne R. Heimbach, David L. Harding, Daniel A. Klein, Daniel Rudman.

Members of the Jury, have you agreed upon a verdict?

THE JURY: We have.

THE CLERK: Who shall say for you?

THE JURY: Our foreman.

THE CLERK: Mr. Foreman, would you stand, please? How say you, as to Donald C. Bacheller, Appeal 456, is the defendant guilty or not guilty?

THE FOREMAN: Guilty.

THE CLERK: How say you as to Allan Green in Appeal 457, is the defendant guilty wherein he stands charged or not guilty?

THE FOREMAN: Guilty.

THE CLERK: How say you as to Wayne R. Heimbach, Appeal 458, is the defendant guilty or not guilty [fol. 387] wherein he stands charged or not guilty?

THE FOREMAN: Guilty.

THE CLERK: How say you as to David L. Harding, in Appeal 460, is the defendant guilty or not guilty wherein he stands charged?

THE FOREMAN: Guilty.

THE CLERK: How say you as to Daniel A. Klein, in Appeal 461, is the defendant guilty or not guilty wherein he stands charged?

THE FOREMAN: Guilty.

THE CLERK: How say you as to Daniel Rudman, in Appeal 462, is the defendant guilty or not guilty wherein he stands charged?

THE FOREMAN: Guilty.

* * *

[fol. 389] THE COURT: I think any comment by the Court may not be in the best taste at this time. The offense of which these young men stand convicted is one that can only have an adverse effect if there is publicity. By what type of mental processes they decided to go to the United States Army recruiting station, deliberately counteracting the effort of the government to get men to serve their country, by doing what they did and then demonstrating,—aside from the fact they drew the attention of as many people possible in the news media to their actions,—is something that I confess I cannot comprehend. I'm also aware of the fact that the design and plan of the whole thing was decided in advance as to what was to be done. It was decided that Harding would be the spokesman and the others would remain silent, and they did. I think this thing was well planned in advance, and was intended to focus as much attention as possible not only protesting the war in Viet Nam but at the efforts of the government to help continue that war as effectively and efficiently as possible.

If news of these series of events were brought to the attention of the men in Viet Nam I am sure it would be [fol. 390] bad for the morale to say the least. And they are college men, intelligent men who do things of this sort.

Well, I am prepared to impose sentence. Mr. Heimbach, is there anything you would like to say before sentence is imposed?

MR. HEIMBACH: No, sir.

THE COURT: Mr. Klein?

MR. KLEIN: No, sir.

THE COURT: Mr. Green?

MR. GREEN: No, sir.

THE COURT: Mr. Rudman?

MR. RUDMAN: No, sir.

THE COURT: Mr. Bacheller?

MR. BACHELLER: No, sir.

THE COURT: Mr. Harding?

MR. HARDING: No, sir.

THE COURT: Very well. As to each of you the sentence of the Court is a term of sixty days in the Baltimore City Jail beginning today and in addition a fine of fifty dollars. I direct that all costs be paid by the defendant in each of the respective appeals, including the [fol. 391] cost of the Municipal Court and Criminal Court of Baltimore City.

* * * *

163

STATE'S EXHIBIT 2

STATE'S EXHIBIT 3



165

STATE'S EXHIBIT 4

Malle Love
Not War

166

STATE'S EXHIBIT 5

JOHNSON
IS
GOLDWATER
IN DISGUISE

167

STATE'S EXHIBIT 6



168

STATE'S EXHIBIT 7

WHY
ARE WE
SUPPORTING
TORTURE,
KILLING
THE PEOPLE
OF
VIETNAM?
... TO PREVENT FREE ELECTIONS
PROTEST
THE
WHITE
HOUSE
President Lyndon B. Johnson
The White House, Washington, D.C.
GET THE STRONG MESSAGE
OUT

STATE'S EXHIBIT 8

169



170

STATE'S EXHIBIT 9



REPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 52

September Term, 1967

DONALD C. BACHELLER, ET AL.

v.

STATE OF MARYLAND

Anderson
Morton
Orth
Thompson
Childs, E. Mackall
(specially assigned),
JJ.

Opinion by Anderson, J.

Filed: April 15, 1968

On April 19, 1966, the appellants were tried in the Municipal Court of Baltimore and convicted of disorderly conduct in violation of Article 27, section 123, Maryland Code (1967 Repl. Vol.). Appellants were each sentenced to a term of sixty days in the Baltimore City Jail and fined fifty dollars plus costs. An appeal was duly noted and a trial *de novo* granted. Trial was held in the Criminal Court of Baltimore on June 8, 1966, before a jury, Judge J. Gilbert Prendergast presiding. Appellants were found guilty and each was sentenced to sixty days in the Baltimore City Jail and fined fifty dollars plus costs.

Appellants raise seven allegations of error on appeal:

1. That Article 27, section 123 is unconstitutional on its face under the First and Fourteenth Amendments to the Constitution of the United States.
2. That Article 27, section 123 as applied was an unconstitutional abridgement of the appellants' right of free speech, expression, petition and assembly, guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.
3. That appellants' convictions violate the First and Fourteenth Amendments because the trial court refused to instruct the jury that appellants had a Constitutional right to express their political beliefs and that the jury could not convict on the basis of a disagreement with appellants' expressed views.
4. That the denomination of appellants' cause before the jury as an "appeal" deprived them of their statutory right to a trial de novo in the Criminal Court of Baltimore City, and their Federal Constitutional right to a fair trial.
5. That the refusal of the trial court to question jurors on the voir dire examination about relatives serving in Vietnam deprived appellants of their statutory right to challenge jurors for cause.
6. That the trial court committed reversible error in reopening the case to allow the testimony, highly prejudicial to the appellants, of a witness for the prosecution who had been taught and prompted by the content of the previous testimony.
7. That the trial court committed reversible error by failing to give a promised instruction that the Jury should exclude from consideration the evidence of events inside the recruiting station.

The evidence adduced below established that on Monday, March 28, 1966, at approximately 3:00 p.m., a group comprised of 30 to 40 demonstrators, evidencing dissatisfaction with the United States policy in the Vietnam conflict, congregated outside the United States Recruiting Station at 3328 Greenmount Avenue, Baltimore, Mary-

land. Subsequently, three of the appellants entered the Recruiting Station and demanded, through their spokesman, Harding, that their protest postres be displayed inside. This request was rejected and the appellants refused to leave until there was compliance with their demand. Thereafter, the three additional appellants also entered and joined the original three.

Mr. Frank Udoff, United States Marshal for the District of Maryland, approached the appellants shortly before the usual 5:00 p.m. closing time, identified himself, and requested them to leave peacefully. This request was rejected and it became necessary for Mr. Udoff to deputize several Baltimore City policemen to assist in the physical removal of the appellants to the sidewalk outside. By stipulation, there was no dispute as to the authority of the Marshal to so remove the appellants.

Some appellants were carried outside and deposited in a prone position upon the sidewalk while others were escorted out. Two appellants attempted to crawl back to the doorway and thus bar its closing.

Appellants then assumed either a semi-circular sitting or prone position, fully blocking the ten to twelve foot sidewalk for picketers and pedestrians alike. This performance attracted a gathering of between 80 and 100 onlookers. Some of the gathering became hostile and hurled statements at the demonstrators inclusive of "let's get them", "we'll take care of them." As the crowd increased its discontent, the police found it necessary to hold the crowd back and to intercede between the two elements. As the situation grew more tense and the anger grew, additional sentiments were hurled from the crowd, such as, "Bomb Hanoi", "let's get them, I'll bust him in the mouth." The resultant turmoil was such that the police found it necessary to fend off the crowd's attempt to vent its displeasure on the demonstrators and to ward off the trampling of the appellants. The size of the crowd continued to increase.

At this juncture, the appellants were ordered by police to get up, but they declined to abide by the order. As the possibility of violence increased the order was repeated three times, but appellants continued to refuse to respect

the order. Subsequently, the officers arrested the appellants and charged them with disorderly conduct directly arising out of the obstruction of the sidewalk which consequentially was causing a public disturbance and the specific refusal to comply with three lawful commands of the police officers.

I and II

The thrust of the appellants' first and second contentions is that Article 27, section 123, Maryland Code Annotated (1967 Repl. Vol.), fails to afford sufficient fair warning that the conduct herein engaged in was subject to criminal sanctions and is therefore unconstitutionally vague and indefinite; and that, furthermore, the application of the statute infringed upon the rights protected by the First and Fourteenth Amendments.

All statutes come before this Court cloaked in a presumption of constitutionality. Therefore, any challenge levied at the constitutionality of a duly enacted statute must clearly establish that said statute plainly contravenes the Federal or State Constitutions, otherwise the presumption remains un rebutted and the statute will not be declared unconstitutional. See *Woodell v. State*, 2 Md. App. 433, 437, 234 A. 2d 890 (1967). Clearly, a statute is within the guidelines of the constitutional safeguards only if persons of ordinary intelligence would be able to know when their conduct would place them in violation of the specified statutory prohibition. *Connally v. General Construction Co.*, 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926); *Lanzetta v. New Jersey*, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888 (1939). However, while compelling strict compliance to such guidelines, the Federal Constitution refrains from the imposition of impossible standards of specificity in the construction of penal statutes. The primary requirement is that a statute convey "sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice." *United States v. Petrillo*, 332 U.S. 1, 8, 67 S.Ct. 1538, 91 L.Ed. 1877 (1947); *United States v. Woodward*, 376 F. 2d 136, 140 (1967).

The formulation of statutory language is, at best, an inexact exercise vulnerable to varying degrees of doubt and ambiguity. Therefore, the enunciation of the meaning and ambit of a specific statute by judicial construction strives to ascertain and define the legislative intent and purpose, and upon making of a determination of the legislative meaning the efficacy of the statute is more clearly and precisely promulgated.

In making our determination of the instant statute's constitutional posture, we remain attentive to the observation of Mr. Justice Holmes in *Roschen v. Ward*, 279 U.S. 337, 49 S. Ct. 336, 73 L.Ed. 722 (1929), when he stated at page 339:

"We agree to all the generalities about not supplying criminal laws with what they omit, but there is no canon against using common sense in construing laws as saying what they obviously mean."

Article 27, section 123, Maryland Code (1967 Repl. Vol.), states in pertinent part:

"Every person who shall be found drunk, or acting in a disorderly manner to the disturbance of the public peace, upon any public street or highway, in any city, town or county in this State * * * shall be deemed guilty of a misdemeanor; and upon conviction thereof, shall be subject to a fine of not more than fifty dollars, or be confined in jail for a period of not more than sixty days or be both fined and imprisoned in the discretion of the court * * *."

In rejecting a prior contention that the statute was unconstitutional on its face, the Court of Appeals in *Drews v. State*, 224 Md. 186, stated at page 192, through Judge Hammond (presently Chief Judge) that:

"The gist of the crime of disorderly conduct under Sec. 123 of Art. 27, as it was in the cases of common law predecessor crimes, is the doing or saying, or both, of that which offends, disturbs, incites, or tends to incite a number of people gathered in the same area. * * * Also, it has been held that failure

to obey a policeman's command to move on when not to do so may endanger the public peace, amounts to disorderly conduct."

In *Sharpe v. State*, 231 Md. 401, 404, 190 A. 2d 628 (1963), while the Court of Appeals did not reach the question of whether the charge of disorderly conduct could be justified, it did observe that "[r]efusal to obey a proper order of an officer *may constitute* an offense justifying an arrest, particularly where there is profanity in the presence of others that may threaten a breach of the peace. Cf. *Drews v. State*, 224 Md. 186, 192 and cases there cited. See also *Lippert v. State*, 139 N.Y.S. 2d 751, *City of St. Petersburg v. Calbeck*, 121 So. 2d 814 (Fla.); *City of Saint Paul v. Morris*, 104 N.W. 2d 902 (Minn.). Other cases are collected in a note, 34 A.L.R. 566." (Emphasis added).

Then in *Harris v. State*, 237 Md. 299, 303, 206 A. 2d 254 (1965), the Court of Appeals stated:

"A failure to obey a reasonable and lawful request by a police officer fairly made to prevent a disturbance of the public peace constitutes disorderly conduct. *Sharpe v. State*, 231 Md. 401, 190 A. 2d 628; *Drews v. State*, 224 Md. 186, 167 A. 2d 341 (vacated on other grounds, 378 U.S. 547, 12 L.Ed. 2d 1032)."

Our review, therefore, is directed not only to the statute per se but to the judicial construction of same, as the cumulative effect constitutes the controlling constitutional posture of the statute at the time of the alleged offense. *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 92, 86 S.Ct. 211, 15 L.Ed. 2d 176 (1965); *Ashton v. Kentucky*, 384 U.S. 195, 198, 86 S.Ct. 1407, 16 L.Ed. 2d 469 (1966).

It is of considerable significance that the prior constitutional challenge levied upon this specific statute and section in *Drews v. State*, *supra*, 224 Md. 186, reversed and remanded on other grounds in *Drews v. Maryland*, 378 U.S. 547 (1964) was affirmed on remand in *Drews v. State*, 236 Md. 349, 204 A. 2d 64 (1964) and the appeal was dismissed and certiorari denied in *Drews v.*

Maryland, 381 U.S. 421 (1965). This in conjunction with the fact that similar disorderly conduct statutes have been held constitutional by the United States Supreme Court in *Feiner v. New York*, 340 U.S. 315, 71 S.Ct. 303, 95 L.Ed. 267 (1951), and *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1034 (1942) leads us to conclude that statutes of this kind are not repugnant to the Federal Constitution.

In *Feiner v. New York*, 340 U.S. 315, 318, 71 S.Ct. 303, 95 L.Ed. 267 (1951), the Supreme Court upheld the conviction of *Feiner* for violation of § 722 of the Penal Law of New York.¹

In that case, *Feiner's* activity was observed by the police without interference until, observing the changing tenor of the crowd, both for and against his expressed views, the police on three occasions, requested him to cease and desist. He refused to do so and the police finally "stepped in to prevent it from resulting in a fight."

In affirming, the Court stated at page 320:

"This Court respects, as it must, the interest of the community in maintaining peace and order on its streets. *Schneider v. State*, 308 U.S. 147, 160 (1939); *Kovacs v. Cooper*, 336 U.S. 77, 82 (1949)."

Applying the common sense doctrine, we find that the instant statute in conjunction with the previous judicial constructions cited was sufficiently definite to inform a man of ordinary intelligence of the nature of activity proscribed. Faced with the present facts and circumstances, it would unduly stretch our credulity to accept the urging that the appellants, after obstructing the

¹ Section 722:

"Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned commits any of the following acts shall be deemed to have committed the offense of disorderly conduct: 1. Uses offensive, disorderly, threatening, abusive or insulting language, conduct or behavior; 2. Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others; 3. Congregates with others on a public street and refuses to move on when ordered by the police; * * *"

sidewalk by sitting and lying down thereon, and refusing to comply with the thrice repeated request by the police, were ignorant of the fact that they were engaged in disorderly conduct of such a nature as legally proscribed.

While it is clear that the protections afforded by the First and Fourteenth Amendments encompass a spectrum of application with regard to freedom of speech that includes the less pure non verbal freedom of speech, *Stromberg v. California*, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931); *Carlson v. People of California*, 310 U.S. 106, 60 S.Ct. 747, 84 L.Ed. 1104 (1940); *Brown v. Louisiana*, 383 U.S. 131, 86 S.Ct. 719, 15 L.Ed. 2d 637 (1966), freedom of even the pure forms of speech are by no means absolute. As Mr. Justice Holmes stated in *Schenck v. United States*, 249 U.S. 47, 52, 39 S.Ct. 247, 63 L.Ed. 470 (1919):

"[T]he character of every act depends upon the circumstances in which it is done. *Aikens v. Wisconsin*, 195 U.S. 194, 205, 206. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."

The controlling principle was enunciated as:

"The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger
* * *"

In the subsequent case of *Frohwerk v. United States*, 249 U.S. 204, 206, 39 S.Ct. 249, 63 L.Ed. 561 (1919), Mr. Justice Holmes extended the aforementioned statement in *Schenck, supra*, stating "that the First Amendment while prohibiting legislation against free speech as such cannot have been, and obviously was not, intended to give immunity for every possible use of language. *Robertson v. Baldwin*, 165 U.S. 275, 281."

Here, however, we are not confronted with such a pure form of expression as the verbalized or printed word, but by a particular form of conduct and as such

the constitutional protection afforded is more limited. We are unaware of any tenet of law which requires the State law enforcement facilities to stand impotently aside, while disruption and strife reign in the streets in the guise of protected activity, nor is the principle of standing responsible for the product of the force or chain of events that one puts into effect alien to our concept of justice. As Mr. Justice Goldberg stated in *Cox v. Louisiana*, 379 U.S. 536, 555, 85 S.Ct. 453, 13 L.Ed. 2d 471 (1965) :

"We emphatically reject the notion urged by appellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech. * * * We reaffirm the statement of the Court in *Giboney v. Empire Storage & Ice Co.*, *supra*, (336 U.S. 490) at 502, that 'it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed'."

Our interpretation of the cases directed at the subject of free speech evidences to our satisfaction that it is the substance rather than the form of communication to which the protection attaches and such regulation of the form is constitutional where same arises from a legitimate State interest and not for the sole purpose of censoring the underlying thought or idea. See *Brown v. Louisiana*, *supra*, (383 U.S. 131); *Cox v. Louisiana*, *supra*, (379 U.S. 536); *Carlson v. California*, *supra*, (310 U.S. 106); *Thornhill v. Alabama*, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940); *Stromberg v. California*, *supra*, (283 U.S. 359).

We find the instant statute to be a proper exercise of the police powers of this State directed toward the maintenance of public order.

III

Appellants' third contention is without merit. The evidence before the trial court clearly established that the arrests and charges resulted from appellants' refusal to cease their obstruction of the sidewalk and resultant public disturbance and because they had refused to comply with three lawful commands of a police officer. We further note that the standing demonstrators were not arrested. Since the evidence adduced below rejected any substance to the allegation that the arrests were predicated upon suppression of political views, the instructions were properly rejected.

IV

Appellants' fourth contention is without merit. Appellants contend that the term "appeals" with respect to their trials, improperly informed the jury that they had been convicted in the Municipal Court of Baltimore City.

The record before use clearly establishes that the trial court excluded all papers reflecting the guilty finding below, and replaced them with papers designating them as "Appeals." Based upon the record below, this allegation constitutes a bald allegation devoid of any evidentiary showing of such prejudice.

V

Appellants' fifth contention also fails. The trial court inquired sufficiently into the areas of general bias or prejudice of the prospective jurors toward the appellants. While rejecting the specific request to inquire on voir dire as to whether or not the jurors had relatives serving in Vietnam, the trial court carefully inquired into whether any preconceived opinions or judgments existed on the jurors' part.

We find that having relatives serving in the Armed Forces an insufficient showing of alleged prejudice to constitute a challenge for cause.

VI

Appellants' sixth contention is devoid of merit. The matter of allowing the State to reopen its case by presenting another witness is clearly within the discretion of the trial court. *Tingler and Wright v. State*, 1 Md. App. 389, 392, 230 A. 2d 375 (1967). Concerning the apparent violation of the sequestration order, it is clear that even where such a violation exists, this would not of itself require a reversal. "It is within the discretion of the trial judge to determine whether to admit the testimony of the witness where there has been a violation of the exclusion order." *Cunningham v. State*, 247 Md. 404, 417, 231 A. 2d 501 (1967); *Mayson v. State*, 238 Md. 283 290, 208 A. 2d 599 (1965). We find no abuse of the trial court's discretion.

VII

Appellants' final contention is without merit. We find the events which lead to the ejection from the Recruiting Station, resulting in the appellant's presence on the sidewalk, constituted a proper and relevant background to the crime charged.

Judgment affirmed.

IN THE COURT OF APPEALS OF MARYLAND

Misc. Docket No. 68 September Term, 1968

(No. 52 - September Term, 1967 Court of Special Appeals)

DONALD C. BACHELLER, ET AL.

v.

STATE OF MARYLAND

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED by the Court of Appeals of Maryland that the said petition be, and it is hereby, denied.

/s/ HALL HAMMOND
Chief Judge

[SEAL]

Date: November 26th, 1968.

SUPREME COURT OF THE UNITED STATES

No. 53 Misc., October Term, 1969

DONALD BACHELLAR, ET AL., PETITIONERS

v.

MARYLAND

On petition for writ of Certiorari to the Court of Special Appeals of the State of Maryland.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS AND GRANTING PETITION
FOR WRIT OF CERTIORARI—October 13, 1969

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 729 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

DEC 27 1969

JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 729

NOT PRINTED

DONALD BACHELLAR, et al.,

Petitioners,

NOT PRINTED

—v.—

STATE OF MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF
SPECIAL APPEALS OF MARYLAND

BRIEF FOR PETITIONER

FRED E. WEISGAL

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 729

DONALD BACHELLAR, et al.,

Petitioners,

—v.—

STATE OF MARYLAND,

Respondent.

**ON WRIT OF CERTIORARI TO THE COURT OF
SPECIAL APPEALS OF MARYLAND**

BRIEF FOR PETITIONER

Opinions Below

The opinion of the Court of Special Appeals of Maryland affirming petitioners' convictions of disorderly conduct is reported at 3 Md. App. 626, 240 A.2d 623, and appears in the Appendix [hereinafter cited as A. —] at A. 171.

The order of the Court of Appeals of Maryland denying certiorari to review the judgment of the Court of Special Appeals was rendered without opinion. It is unreported and appears at A. 182.

Jurisdiction

The Court of Appeals of Maryland denied review on November 26, 1968. Petition for a writ of *certiorari* was filed in this Court on February 19, 1969, and was granted on October 13, 1969. The Court's jurisdiction rests upon 28 U.S.C. § 1257(3) (1964), petitioner having asserted below and asserting here the deprivation of rights secured by the Constitution of the United States.¹

Questions Presented

1. Petitioners were convicted of the offense of disorderly conduct on the basis of events which occurred during a demonstration protesting the Viet Nam War at a United States Army recruiting center. The statute involved defines disorderly conduct as "acting in a disorderly manner to the disturbance of the public peace." It has been interpreted judicially to mean (i) "doing or saying, or both, of that which offends, disturbs, incites, or tends to incite a number of people gathered in the same area," or (ii) refusing "to obey a policeman's command to move on when not to do so may endanger the public peace." Is this statute unconstitutional on its face, as construed by the highest court of the State, or as applied to these petitioners, by force of the First and Fourteenth Amendments?

¹ Because the Court of Appeals of Maryland declined to exercise its discretionary jurisdiction to review the final judgment of the Court of Special Appeals, this Court's writ properly runs to the latter court. *Virginian Ry. Co. v. Mullens*, 271 U.S. 220, 222 (1926); *Lee v. Florida*, 392 U.S. 378 (1968). The petition for *certiorari* was timely filed here within ninety days following the order of the Court of Appeals. *American Railway Express Co. v. Levee*, 263 U.S. 19, 20-21 (1923); *Smith v. Illinois*, 390 U.S. 129 (1968).

2. The persons alleged to have been "offended, disturbed, or incited" because of petitioners' actions were members of a crowd of unsympathetic spectators. The record is clear that whatever offense, disturbance or incitement was felt by the crowd was occasioned solely by its opposition to the ideas expressed by petitioners: specifically, their anti-war views. On this record, was the disorderly conduct statute applied in violation of the First and Fourteenth Amendments because it was employed to punish petitioners for ideas and opinions deemed to create a public disturbance?

3. The prosecution's evidence tended to show that petitioners "offended, disturbed, or incited" a crowd of spectators by force of their expressed anti-war views. Petitioners' evidence tended to show that the only ground upon which the spectators were disturbed was hostility to the content of petitioners' ideas. Petitioners therefore requested jury instructions to the effect that petitioners had a right to express their political views and ideas, and could not be punished or ordered to leave the street solely because those ideas induced a condition of unrest, dispute or anger in other people. The requested instructions were cast precisely in the language of this Court's decision in *Terminiello v. City of Chicago*, 337 U.S. 1 (1949). Did the trial court err constitutionally in refusing to give these instructions?

Constitutional and Statutory Provisions Involved

This case involves the First Amendment and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

It also involves the italicized portion of the following Maryland statute:

MARYLAND CODE ANNOTATED, ART. 27 § 123
(1967 Repl. Vol.)

§123. *Drunkenness and disorderly conduct generally; habitual offenders.*

"Every person who shall be found drunk, or acting in a disorderly manner to the disturbance of the public peace, upon any public street or highway, in any city, town or county in this State, or at any place of public worship or public resort or amusement in any city, town or county of this State, or in any store during business hours, or in any elevator, lobby or corridor of any office building or apartment house having more than three separate dwelling units in any city, town or county of this State, and any person who drinks, or has in his possession, any intoxicating beverages while in attendance as a spectator or otherwise, at any place where an elementary school, junior high school or high school athletic contest is taking place, shall be deemed guilty of a misdemeanor; and upon conviction thereof shall be subject to a fine of not more than fifty dollars, or be confined in jail for a period of not more than sixty days or be both fined and imprisoned in the discretion of the court. Habitual offenders may be fined not more than one hundred dollars or committed to jail or the Maryland House of Correction for not more than six months. An habitual offender is a person who shall have been convicted under the provisions of this section five (5) times in the preceding twelve (12) months. The trial magistrates of the respective counties of this State shall have concurrent jurisdiction

over such offense with the circuit court for their respective counties." (Emphasis added.)²

Statement

A. HISTORY OF THE PROCEEDINGS

On April 19, 1966, the six petitioners were found guilty of disorderly conduct under MD. CODE ANN., Art. 27, § 123 (1967 Repl. Vol.) in the Municipal Court of Baltimore Criminal Division. (A. 5.) Each was sentenced to imprisonment for sixty days in the Baltimore City Jail and a fine of \$50 and costs. (A. 5.) Each noted a timely appeal for trial *de novo* in the Criminal Court of Baltimore City. (A. 7.)³

On June 6, 1966, petitioners moved the Criminal Court to dismiss the prosecution on the ground that Art. 27, § 123, on its face and as construed by the Court of Appeals of Maryland, abridged their rights of free speech, petition and assembly, and was vague, indefinite and overbroad, in violation of the First and Fourteenth Amendments. (A. 7-8.) The motion was denied on June 8. (A. 18-19 [Tr. 3-4].)

² The statute is set forth as it read prior to July 1, 1968. An amendment of that date, MD. LAWS 1968, ch. 146, § 3, revised the section so as to enumerate in subsections the several distinct offenses that the statute condemns. The prohibition against acting "in a disorderly manner to the disturbance of the public peace, upon any public street, highway . . ." etc. is carried forward unchanged in subsection (c). See MD. CODE ANN., Art. 27, § 123 (1969 Cum. Supp.).

³ The docket entries, commitments and notices of appeal were separate but identical for each petitioner. The Appendix reproduces these documents in the Bachellar case only, as representative of the documents in each petitioner's case.

The cases were tried jointly to a jury between June 8 and June 13. At the conclusion of the State's case, petitioners moved in writing for a "judgment of acquittal or for dismissal on the evidence." This motion challenged not merely the sufficiency of the evidence but also the constitutionality of Art. 27, § 123, on its face and as applied to the facts shown by the State's proof. It invoked the First and Fourteenth Amendments and the doctrines of vagueness and overbreadth. (A. 9-11.) The motion was denied (A. 80 [Tr. 169]), renewed at the close of all the evidence (A. 153 [Tr. 362]), and again denied (*ibid.*).

Petitioners submitted written requests for instructions based upon the language of this Court in *Terminiello v. City of Chicago*, 337 U.S. 1 (1949). As we shall see below, the offense of disorderly conduct may be made out, under Maryland law, pursuant to either of two theories. The first theory involves "offending, disturbing or inciting" the public. The second involves disobeying a police order under circumstances likely to cause a disturbance. Petitioners' requested instructions sought to limit each theory to a compass consistent with the First and Fourteenth Amendments.

Requested Instructions I through IV-A dealt with the disobeying-a-police-order theory, and asked that the jury be charged as follows: *first*, that the petitioners could not be convicted unless they disobeyed "a reasonable and lawful police order," clearly communicated to them (Requested Instruction I); *second*, that a police order to disperse is reasonable and lawful only "if it is made to prevent an imminent public disturbance, and if it is reasonably necessary in order to prevent such a disturbance" (Requested Instruction II); and *third*, that a "public disturbance," for this pur-

pose, means "physical violence, or the attempt to use physical violence," and not merely "an episode of shouting or singing or name-calling not calculated to spill over into imminent violence" (Requested Instruction III). Requested Instruction IV said that the police could not order petitioners to move on if petitioners "were doing only what they had a right to do"⁴ even though petitioners might thereby "anger others and make others want to resort to violence." It added that: "In such a case it is the obligation of the police to protect the citizen from violence by others, and they may not tell him to stop doing what he is doing, or to move along or go away merely because of threats of violence by others."

Requested Instruction IV-A was an alternative to IV. It conceded that the police might sometimes lawfully order an individual to desist from conduct on the ground that his conduct was arousing others to violence against him; but it insisted that a police order of this sort could not be given "unless the police reasonably believe that it is impossible to prevent violence from occurring by restraining only those persons who are threatening violence."⁵

⁴ One part of the purpose of Requested Instruction VII, *infra*, was to define the scope of petitioners' First Amendment rights for purposes of this Requested Instruction IV. Another purpose of Requested Instruction VII was to delimit the disturbing-the-public theory of disorderly conduct consistently with the First Amendment.

⁵ Requested Instruction IV-A continued: "In such a case, the police are obligated first to attempt to quell the danger of violence by telling those persons who are threatening violence to move along or disperse, and by restraining or arresting them if necessary and if practicable, before they may order persons to stop doing acts which are themselves peaceful and which threaten to lead to a disturbance only because they anger others."

Alternative Instruction I-A covered the disturbing-the-public theory of disorderly conduct. It would have permitted conviction of the petitioners if they either (1) disobeyed a police order (within the limitations described above), or "(2) knowingly and purposely engaged in acts which they had no lawful right to do, and which were calculated and likely in themselves to lead to an imminent public disturbance [as defined above]; or (3) knowingly and purposely engaged in acts which they had no lawful right to do, and which obstructed or hindered pedestrians or traffic." Again, however, it would have imposed the limitation that petitioners could not be convicted under the second theory, disturbing the public, "if they were doing only what they had a right to do," although they might thereby "anger others and make others want to resort to violence."⁶

Requested Instructions V through VII governed both the disobeying-a-police-order and the disturbing-the-public theories of disorderly conduct. They were as follows:⁷

"INSTRUCTION V.

"Under no circumstances may you convict these defendants if the only conduct of theirs which was likely to lead to an imminent public disturbance was the expression of views or ideas which other people did not like or resented, or which stirred other people to anger

⁶ The quoted language is from Requested Instructions IV and IV-A, which would have been modified by I-A to apply to the disturbing-the-public theory as well as to the disobeying-a-police-order theory.

⁷ The bracketed language in the following instructions would have been inserted by I-A to adopt V through VII to the disturbing-the-public theory as well as the disobeying-a-police-order theory.

or violence. The defendants may be convicted only if their conduct, or their manner of expressing their ideas was offensive and likely to lead to a public disturbance, and not if it was the ideas themselves that they were expressing or supporting, which were likely to create a public disturbance. Where conduct—in this case the physical acts of the defendants—is likely to lead to imminent public disturbance, [that conduct is disorderly conduct; also] the police may order it stopped, and the refusal to obey such an order is disorderly conduct. But where the danger of imminent public disturbance created by an individual arises from the ideas or the views or beliefs which he expresses, he may not be required to stop and is not guilty of disorderly conduct [for expressing those views or] for refusing to obey a police order to stop expressing his views.

"INSTRUCTION VI.

"Specifically, I charge you that if the only threat of public disturbance arising from the actions of these defendants was a threat that arose from the anger of others who were made angry by their disagreement with the defendants' expressed views concerning Viet Nam, or American involvement in Viet Nam, you must acquit these defendants. And if you have a reasonable doubt whether the anger of those other persons was occasioned by their disagreement with defendants' views on Viet Nam, rather than by the conduct of the defendants in sitting or staying on the street, you must acquit these defendants.

"INSTRUCTION VII.

"The defendants at all times had a legally protected right to set forth their political views, beliefs or ideology even if the result was to induce a condition of unrest, create dissatisfaction in others, invite dispute, or even stir people to anger at their views. If they did nothing more to create a public disturbance than to exercise this right, [they are not guilty of disorderly conduct;] the police could not lawfully order them to move along or go away, and they are not guilty of disorderly conduct for disobeying such a police order."

All of these requested instructions (A. 12-16) were refused. (A. 17, 153-154 [Tr. 362-363].) In a bench conference, defense counsel pointed out to the court that the refusal of his requests "deprives the defendants of procedural due process in that the law with respect to disorderly conduct is so vague, so indefinite, that . . . it becomes impossible for defense counsel, without knowing what the Court's instructions are going to be, to properly argue to the jury." (A. 154 [Tr. 363].) The court responded:

" . . . I intend to tell the jury that disorderly conduct is the doing or saying or both of that which offends, disturbs, incites or tends to incite a number of people gathered in the same area. It is conduct of such a nature as to affect the peace and quiet of persons who may witness it and who may be disturbed or provoked to resentment because of it. A refusal to obey a policeman's command to move on, not to do so may endanger the public peace may amount [sic] to disorderly conduct.

"Now you know what the definition is. . . ." (A. 154 [Tr. 363-364].)

The court's entire charge to the jury with regard to the definition of the offense of disorderly conduct was as follows:

" . . . I . . . invite your attention to the fact that each of the six defendants on trial before you today is charged with the crime known as disorderly conduct. Therefor [sic] it becomes necessary that I advise you as to what is meant by disorderly conduct.

"At common law there was no offense known by that term. In more recent times, however, the charge is contained in a statute known as Section 123 of Article 27 of the Maryland Annotated Code. The essential parts of this statute I will now read to you.

" 'Every person who shall be found acting in a disorderly manner to the disturbance of the public peace upon any public street or highway in any city, town or county in this state shall be deemed guilty of a misdemeanor'.

"That misdemeanor is known as disorderly conduct. In further amplification of the meaning of the charge, I instruct you that disorderly conduct is the doing or saying or both of that which offends, disturbs, incites or tends to incite a number of people gathered in the same area. It is conduct of such nature as to affect the peace and quiet of persons who may witness it and who may be disturbed or provoked to resentment because of it. A refusal to obey a policeman's command to move on when not to do so may endanger the public peace, may amount to disorderly conduct." (A. 155-156 [Tr. 375-376].)

Petitioners duly took exception "to the definition of disorderly conduct in that it is vague and abrogates the de-

endants' rights as guaranteed by the First and Fourteenth Amendments, of the United States Constitution." (A. 159 [Tr. 381].)

The jury found each of the petitioners guilty by a general verdict. (A. 159-160 [Tr. 386-387].) The court sentenced each of them to the maximum allowable sentence, sixty days in the Baltimore City Jail and a fine of fifty dollars plus costs (A. 161 [Tr. 390-391]), after remarking that he could not comprehend by "what type of mental processes they decided to go to the United States Army recruiting station, deliberately counteracting the effort of the government to get men to serve their country, by doing what they did and then demonstrating. . . . I think this thing was well planned in advance, and was intended to focus as much attention as possible not only protesting the war in Viet Nam but at the efforts of the government to help continue that war as effectively and efficiently as possible. If news of these series of events were brought to the attention of the men in Viet Nam I am sure it would be bad for the morale to say the least. And they are college men, intelligent men who do things of this sort." (A. 160 [Tr. 389-390].)

Petitioners noticed a timely appeal to the Court of Appeals of Maryland, which shortly thereafter transferred the case to the newly-created Court of Special Appeals. In the Court of Special Appeals, petitioners contended, *inter alia*, (1) that the Maryland disorderly conduct statute, MD. CODE ANN. Art. 27, § 123, on its face and as authoritatively construed by the Maryland courts, was unconstitutional by force of the First and Fourteenth Amendments; (2) that the same Amendments forbade the application of

the statute to punish petitioners on this record, since the record made plain that the disturbance for which they were ordered to disperse, arrested and convicted was an ideological resentment by spectators of their expressed anti-war views; and (3) that the trial court erred, under the same Amendments, in refusing their requests for instruction. On April 15, 1968, the Court of Special Appeals handed down its opinion affirming the convictions and rejecting each of these contentions on the merits. (A. 171-181.)

The same contentions were made in a petition for *certiorari* addressed to the Court of Appeals of Maryland. The Court of Appeals declined to review the case by order of November 26, 1968. A *certiorari* petition was filed in this Court on February 19, 1969 and granted on October 13, 1969 (A. 183).

B. THE DEMONSTRATION AT THE RECRUITING CENTER

(This section contains a general description of the events at the Army Recruiting Center, out of which petitioners' prosecutions arose. Page references to prosecution testimony are made in roman type, to defense testimony in italic type, and to the findings of the Court of Special Appeals in bold type. Factual details particularly relevant to one or another of petitioners' constitutional contentions are reserved for discussion in connection with those contentions in the Argument sections, *infra*.

If petitioners' only contentions in this Court related to the constitutionality of Art. 27, § 123 on its face and as applied to petitioners' conduct, there would be no occasion here to refer to contradicted defense testimony. We

should simply state the version of the facts as the jury might have found them most favorably to the prosecution, in the way that the Court of Special Appeals did. But petitioners also challenge the refusal of the trial court to give instructions that they requested under the First Amendment. With regard to that contention, defense evidence is obviously material. For the Court's convenience, we italicize any factual assertion in the following statement that rests upon controverted defense testimony.)

On Monday, March 28, 1966, at about 3:00 p.m., a group of demonstrators gathered outside the United States Army Recruiting Station at 3328 Greenmount Avenue, Baltimore. (A. 21, 24-25, 37, 43, 49, 79, 172-173 [Tr. 28-30, 39, 69, 84, 96, 165; S.O. 2].) The number of demonstrators gradually increased to thirty or forty. (A. 22, 37, 79, 172 [Tr. 30, 69, 165; S.O. 2].) Most of them picketed in a circle on the sidewalk in front of the Recruiting Station, carrying placards that bore slogans of protest against American involvement in the Viet Nam War. (A. 21-22, 37, 50, 79 [Tr. 30, 69, 97, 165-166]; State's Exhibits Nos. 4, 5, 6, 8.) A crowd of spectators gathered (A. 43, 50-51, 52-53 [Tr. 84, 98-99, 102]), and some of the demonstrators circulated in this crowd, distributing leaflets. (A. 47-48, 50, 52, 53 [Tr. 93, 98, 102, 104].) The demonstrators were peaceful and orderly at all times. (A. 51-53, 58, 120-121, 125, 132, 149 [Tr. 99-102, 111-112, 264, 275, 292, 348-349].)

Demonstrators had phoned the police to advise them in advance of the demonstration. (A. 101 [Tr. 218-219]; see also A. 21, 37, 48 [Tr. 29-30, 68, 94-95].) Consequently, there were a number of police inside and outside the Sta-

tion (A. 28, 29, 32-33, 37, 43, 48-49 [Tr. 47, 49, 57-58, 68-69, 83-85, 96]); and the United States Marshal with several deputies was also inside (A. 23, 24-25, 28, 31-33 [Tr. 33, 39, 47, 54-55, 56-58]).

At approximately 3:30 p.m., three of the petitioners, who had been among the demonstrators on the picket line (A. 40-41 [Tr. 77-79]; State's Exhibits Nos. 4-6), left the line and entered the Recruiting Station. (A. 22, 173 [Tr. 30; S.O. 2].) They requested the sergeant in charge to place some of their posters and literature on display inside. (A. 22, 43, 81, 173 [Tr. 30, 84, 172; S.O. 2].) He refused. (A. 22-23, 43, 173 [Tr. 31-32, 84; S.O. 2].) They said that they would remain in the station until the posters were displayed. (A. 23, 173 [Tr. 32-33; S.O. 2].) Other demonstrators were coming in and out of the Station, and the group continued to talk, discuss and argue with the sergeant. (A. 25, 41, 43 [Tr. 39, 78, 84-85]; see State's Exhibits Nos. 3, 7.) No effort was made to remove them until just before closing time. (See A. 23-24, 25 [Tr. 32-34, 39-40].) By that hour, the remaining three petitioners had also entered the Station. (A. 24, 173 [Tr. 35-36; S.O. 2].)

Shortly before the usual 5:00 p.m. closing hour, the sergeant and the United States Marshal ordered the six petitioners to leave. (A. 23-24, 25-26, 31, 37, 43-44, 82, 102, 108, 153, 173 [Tr. 34, 40-41, 55, 69-70, 85-86, 174, 222, 233, 361; S.O. 2].) They refused (*ibid.*), and were then forcibly ejected from the Station by the Marshal, his deputies, and deputized police. (A. 26, 29, 31-32, 37-38, 44, 173 [Tr. 42-43, 49-50, 55-56, 70, 86; S.O. 2].) The police testimony is that petitioners were "escorted" out (A. 26, 29-30, 31, 32 [Tr. 42, 49-51, 55, 57]); that they were

"sort of forced out" (A. 29 [Tr. 50]); that they were carried out bodily (A. 29, 34, 37-38, 46-47 [Tr. 50, 61-62, 70, 91]), two officers holding each of them by the arms and legs (A. 35, 76, 79 [Tr. 63, 158, 166]); and that they were "put" on the sidewalk (A. 35 [Tr. 63-64]), or "placed" on the sidewalk, or "placed down" on the sidewalk (A. 37-38, 44, 76, 78 [Tr. 70, 87, 159, 163-165]) outside. As to the position in which the petitioners landed on the sidewalk, one deputy marshal testified: "I don't recall, sir. As I recall I believe most of them were in a standing position. There might have been some that were seated but I don't recall." (A. 35 [Tr. 64]; see also A. 36 [Tr. 65-66].) Another officer testified that petitioners were "picked up and deposited outside on the sidewalk" (A. 44 [Tr. 86]; see also A. 54-56 [Tr. 104-110]); asked how the petitioners got into a sitting posture on the sidewalk, he testified that they were "deposited there by us" (A. 46-47 [Tr. 91]; see also A. 38, 44 [Tr. 72, 87]). "They were dropped; carried and dropped right out." (A. 47 [Tr. 92].) The officer could not remember how they landed, except that the last of the six (which of the petitioners, the officer also could not remember) was put down on his feet. (A. 47 [Tr. 92]; see also A. 54-55, 76, 78 [Tr. 104-107, 158-159, 163-165].) *Petitioners and defense witnesses testified consistently that petitioners were thrown forcefully onto the pavement and landed on their backs or rumps.* (A. 82-84, 90-91, 102-103, 121-122, 126, 130-131, 132, 134-135, 153 [Tr. 174-177, 191-193, 222-223, 266-267, 276, 286-287, 292, 296-297, 360].) A prosecution rebuttal witness, the newspaper reporter Fogarty, contradicted both this defense testimony and the testimony of the police that even some of the petitioners were

placed on their feet. His version of the eviction was that the marshals and the police carried the boys out of the Station with their bodies "less than a foot" off the ground (A. 141 [Tr. 321]) and "set them down on the pavement" (A. 141 [Tr. 322]), where they landed "[o]n their rear" (*ibid.*). The Court of Special Appeals, concluded, with somewhat greater clarity than the record will allow, that: "Some [of the petitioners] . . . were carried outside and deposited in a prone position upon the sidewalk while others were escorted out." (A. 173 [S.O. 3].)

The testimonial accounts of what petitioners did after they hit the sidewalk are also in hopeless disagreement. One police officer said that two of them tried to crawl back towards the Recruiting Station (A. 38, 173 [Tr. 70; S.O. 3]); but no other witness mentioned this. For the most part, the police version is that the petitioners "lied down for about a minute and then they came to a sitting position" (A. 38 [Tr. 72]; see also 45, 70, 78 [Tr. 88, 143-144, 162-163]), and thereafter sat in a semi-circle, completely blocking the sidewalk (A. 38-39, 44-45, 55-57, 60, 69, 71, 173 [Tr. 72, 87-89, 108, 110, 111, 117, 142, 146; S.O. 3]). *Petitioners and defense witnesses claim that petitioners sat or sprawled, some on top of others, where they had been thrown; that they did not move except to try to get up; and that they were restrained from getting up by the police.* (A. 82-83, 91-94, 95, 98-99, 103-104, 106-107, 109, 111-112, 127-128, 130, 134-135 [Tr. 175-176, 194-199, 203, 211-214, 224, 230-231, 235-236, 242-243, 279-281, 286, 296-297].) *According to the defense testimony, petitioners were not so positioned as to block the sidewalk; rather, the sidewalk was blocked on both sides by the crowd of spectators that had gathered to watch*

their ejection from the Recruiting Station. (A. 91-92, 111, 113, 129-130, 133 [Tr. 193-195, 240-241, 245-246, 283-284, 293].)

In any event, when petitioners emerged from the Station, the picket line dispersed and a crowd of 50 to 150 people—including the 30 to 40 picketers—collected around to watch. (A. 38-39, 44, 45-46, 60-61 [Tr. 72-73, 87, 89, 118].)* It appears to be uncontested that this crowd was in fact blocking the sidewalk so that it would have been impossible for pedestrians to traverse the area where petitioners were placed. (A. 38-39, 45 [Tr. 72, 89]; State's Exhibits Nos. 2, 9.) Some of the spectators in the crowd expressed hostility to the anti-war protest or to the petitioners by chanting "Bomb Hanoi"; and there were a couple of shouts: "let's get them," or "Let me get to them; I'll bust him in the mouth" (A. 39, 46, 48, 58, 71, 148, 173 [Tr. 73, 89-90, 94, 114, 146, 325-326; S.O. 3]). Petitioners responded by singing "*We shall overcome.*" (A. 45, 60, 62, 84, 93-94, 104-105 [Tr. 88, 117, 121, 179, 198, 226].) Police surrounding the petitioners felt the crowd pressing forward, "pushing in" (A. 55 [Tr. 107]; see also A. 39, 45, 56, 60, 71, 150 [Tr. 73, 89, 109, 117, 146, 351-352]), but no one charged or attempted to assault the petitioners (A. 84, 97-98, 104-105, 150 [Tr. 178, 209, 226-227, 351]).* Although demonstrators still holding

* The Court of Special Appeals found that there were "between 80 and 100 onlookers" at this time and that the crowd later grew larger. (A. 173 [S.O. 3].) The record will support the conclusion that eventually as many as 150 persons gathered outside the Recruiting Station watching the petitioners. But each of these estimates includes 30 or 40 anti-war demonstrators and pickets. (A. 60-61) [Tr. 118].)

* The Court of Special Appeals concluded that "the police found it necessary to hold the crowd back and to intercede between the two elements. . . . The resultant turmoil was such that the police

their anti-war placards were mingled with the "hostile" spectators in the crowd (A. 55, 56, 59-60, 64, 93, 103, 117-119, 123, 127, 130, 133 [Tr. 107-108, 110, 116, 117-118, 127, 198, 223-224, 256-262, 269-270, 279, 284, 294]), there were no fights or attempts to attack these demonstrators; nor were there even any threats made against them (A. 61, 114, 118, 119, 123, 126, 127, 133 [Tr. 120, 250, 259, 261, 270, 276-277, 279, 294]).

Petitioners and defense witnesses testified that the crowd was curious but at all times peaceful and controlled. (A. 84, 105, 114, 123, 126, 138 [Tr. 178, 227, 259, 270, 276-277, 303-304]; see also State's witness Fogarty, at A. 143, 150 [Tr. 326, 351-352].) *Neither the petitioners nor the other demonstrators who testified below felt that their safety was threatened by the crowd.* (A. 97-98, 105, 114, 123, 126, 127, 137-138 [Tr. 209-210, 227, 249-250, 259, 270, 276-277, 279, 302-304].) It is uncontested that there was adequate police protection at all times by considerably more than twelve police officers (A. 32-33, 37, 46,

found it necessary to fend off the crowd's attempt to vent its displeasure on the demonstrators and to ward off the trampling of the appellants." (A. 173 [S.O. 3].) The record supports these statements as an accurate view of what the police "found"—that is, what the police thought—(A. 44, 45, 46-47, 56, 61, 65 [Tr. 87, 89, 90-93, 109, 119, 129]) but not as an accurate description of what actually happened in front of the Recruiting Station. What actually happened was: (1) no aggressive behavior whatever by any petitioner or demonstrator toward any of the "hostile" spectators; (2) no attempt by any "hostile" spectator to attack any of the demonstrators scattered through the "hostile" crowd; (3) two verbal threats toward petitioners described in text, *supra*; (4) a pushing forward of the crowd, which may have been occasioned either by "hostility" or by the curiosity of those in the rear (see A. 150 [Tr. 351-352]); and (5) no attempt by anyone to charge or physically molest the petitioners, other than this general movement of the crowd. See text *supra* and immediately *infra*.

48-49, 50, 63-64, 66, 68, 74-75, 136 [Tr. 57-58, 69, 90-91, 94-95, 97, 125-126, 131, 139, 154-155, 299]); and that more officers could have been obtained if they had been needed (A. 66 [Tr. 131]).

However, the police concluded that the crowd was hostile to the protest and to petitioners (A. 39, 47-48, 56, 61, 62-63, 64-65, 73 [Tr. 72-73, 93-94, 109-110, 118-119, 123, 128-130, 152]), and decided to arrest petitioners in order to protect them from getting hurt (A. 46, 59, 60, 61, 65 [Tr. 90, 115, 117, 119, 129]). One officer testified that he first attempted to disperse the crowd "many a time" (A. 51, 65 [Tr. 100, 130-131]), but *six defense witnesses and a reporter called by the prosecution testified that the crowd was not asked to disperse* (A. 113, 118, 119, 122, 126, 132-133, 149-150 [Tr. 245, 257, 261, 268-269, 277, 293, 351]).

According to the police testimony, the officers several times ordered petitioners to leave the sidewalk and they failed to respond. (A. 38, 45, 47-48, 55, 56-57, 58-59, 62, 67, 69, 70-71, 72-74 [Tr. 72, 88, 92-94, 107, 109-111, 113-115, 121-122, 135, 141-142, 145, 149-152].) The Court of Special Appeals found that the police repeated this order three times. (A. 173 [S.O. 3].) *Defense witnesses testified that no such order was given* (A. 83, 94-95, 96-97, 104, 109, 115, 122, 126-127, 132, 136-137 [Tr. 176-177, 198, 202-203, 206-207, 225-226, 235-236, 250-251, 268, 277, 293, 300-301]), and that petitioners were in some cases restrained by officers from getting up off the sidewalk (A. 83, 92-93, 95, 98-99, 103-104, 106-107, 109, 112, 128, 134-135 [Tr. 176, 195-197, 203, 211-213, 224, 230-231, 236, 242-243, 281, 296-297]). After petitioners had been on the pave-

ment for a total period estimated as fifteen or twenty minutes by a prosecution witness (A. 142, 149 [Tr. 323, 347-348]), and as no more than five minutes by defense witnesses (A. 84, 96, 106, 124, 153 [Tr. 179, 204-205, 230, 272, 360]), petitioners were arrested and charged with disorderly conduct (A. 45, 55, 59, 66-67, 69-70, 74 [Tr. 88-89, 107, 114-115, 135, 142-143, 154]).

Summary of Argument

I.

The narrow question presented here is whether petitioners' convictions of the particular offense of disorderly conduct defined by Maryland law can stand, on this record, consistently with the First Amendment. As submitted to the jury below, disorderly conduct is *either* "doing or saying or both of that which offends, disturbs, incites or tends to incite a number of people gathered" in an area, *or* refusing to obey a police order to move along "when not to do so may endanger the public peace." If either of these definitions is constitutionally impermissible, petitioners' convictions must be reversed.

II.

Both definitions are unconstitutionally vague and overbroad under the "strict" standards of definiteness required by this Court's decisions of legislation that may overreach First Amendment freedoms. The disturbing-the-public definition falls squarely within the condemnation of a long line of cases from *Cantwell v. Connecticut* to *Cox v. Louisiana*. The police-order definition is plainly ruled uncon-

stitutional by *Cox* and by *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965).

Each definition presents an extreme instance of the several vices that attend sweeping penal legislation intruded into the First Amendment area. Each fails to give fair notice of what is prohibited by it. Each delegates arbitrary and censorial power to the police and to juries. Each thereby permits criminal liability to be imposed on the basis of nothing more than the expression of unpopular ideas. Consequently, each operates broadly to deter constitutionally protected free speech. Both definitions, and the statute construed to embody them, are facially unconstitutional.

III.

Under these definitions, petitioners have been convicted of disturbing the public, or of disobeying a police order under circumstances likely to disturb the public. But the record is plain that the only "disturbance" occasioned by the petitioners was the angry and resentful response of a crowd of spectators who disagreed with petitioners' views concerning the Viet Nam War. Any conviction for creating this kind of disturbance plainly flouts the First Amendment.

Neither the police order which petitioners allegedly disobeyed nor their convictions can be constitutionally sustained on the theory of incipient violence on the part of the spectators. This is so both because violent opposition to an idea will not warrant suppression of the idea and because, on this record, the threat of violence was factually insubstantial. As applied to these petitioners, Mary-

land's disorderly conduct law has become the instrument of punishment of ideological unpopularity and nothing more. So applied, it is unconstitutional.

IV.

Whether or not the record *compels* the conclusion that the "disturbance" created by petitioners was ideological, it plainly *permits* that conclusion. The jury might have found no "disturbance" other than resentment of petitioners' anti-war views by spectators. The trial court's charge allowed conviction if petitioners disturbed, offended or incited the spectators; and the charge did not define those terms. It was obvious constitutional error, under these circumstances, to refuse requested instructions tendered by the defense that would have told the jury it could not convict petitioners for nothing more than making spectators angry by the expression of their anti-war views.

For the same reason, it was constitutional error to refuse requested defense instructions that would have limited criminal disobedience of a police order to disobedience of a "reasonable and lawful" police order, and would have given the jury appropriate constitutional standards for the determinations of reasonableness and lawfulness. Without the qualifications contained in the requested and refused instructions, the theories of disorderly-conduct liability submitted to the jury permitted conviction on overbroad and sweeping grounds forbidden by the First Amendment.

ARGUMENT

I.

Introduction

In the context of this Court's First Amendment decisions, the issues raised here are vital but very narrow. Each of the three questions presented relates to petitioners' convictions of the particular crime of disorderly conduct defined by a particular Maryland statute, on the record of a trial of the factual controversies framed by the terms of that statute. No question is presented as to whether Maryland might constitutionally punish these petitioners for some differently defined offense after some differently conducted trial.

We make this point at the outset for the obvious reason that petitioners' conduct may seem blameworthy to the Court. Petitioners appear to have conducted a sit-in in an Army Recruiting Center, and they may also have conducted a sit-down on a Baltimore sidewalk. We say "appear" and "may" with no purpose to be cute or evasive. Exactly what occurred inside the recruiting office was never tried in an adversary fashion below, since it lay outside the scope of the charge against petitioners.¹⁰ And whether petitioners

¹⁰ Petitioners were not charged with any offense on the basis of their conduct within the Recruiting Center. The statute on which the prosecution was based, MD. CODE ANN., Art. 27, § 123, defines disorderly conduct in a manner that has no flavor of criminal trespass. Moreover, Art. 27, § 123 is limited by its terms to disorderly conduct "upon any public street or highway" or in other enumerated places none of which includes by any stretch of the imagination a United States Army Recruiting Station. Compare MD. CODE ANN., Art. 27 §§ 122, 124 (1967 Repl. Vol.).

[footnote 10 cont'd on next page]

did or did not wilfully sit or stay seated on the sidewalk was the subject of intense factual dispute at their trial—a dispute that petitioners' jurors never resolved because it was not submitted to them as decisive of the issue of petitioners' guilt under the disorderly conduct charge.¹¹

On the present record, therefore, it is not surprising that no disorderly conduct within the recruiting center was alleged or proved. Neither the police nor the United States Marshal arrested the petitioners for their conduct within the Center. One of the arresting officers testified that he had no jurisdiction inside the Center (A. 43 [Tr. 85]); and no officer suggested that events in the Center prompted petitioners' arrest and charge. To the contrary, all police testimony is to the effect that the decision to arrest petitioners was based entirely upon their conduct, and the conduct of the spectators, after their ejection from the Center. (See A. 59, 60, 61, 65 [Tr. 115, 117, 119, 129].) At the conclusion of the testimony, the trial court declared that the offense of "disorderly conduct, with which they are charged does not relate to anything that took place inside of the office." (A. 154 [Tr. 362-363].)

Accordingly, defense counsel had little concern at trial for events that occurred inside the Recruiting Center. The prosecution's principal witness concerning those events was the sergeant in charge of the installation. (See A. 20-24 [Tr. 26-36].) He was not cross-examined by the defense. Defense examination of other witnesses regarding occurrences within the center was limited to showing that petitioners were seized and thrown out bodily in a manner that explained their prone positions on the sidewalk outside and thereby negated the notion of a willful sit-down.

¹¹ Petitioners were not charged with obstructing a sidewalk. It is dubious whether any Maryland statute makes such obstruction an offense. *Cf.* MD. CODE ANN., Art. 27, § 121 (1967 Repl. Vol.), dealing with the obstruction of free passage along a street or highway or in the area of a railroad station. In any event, obstruction of the sidewalk was not charged here; and, although the issue was the subject of conflicting evidence at trial, it was not submitted for the jury's resolution. Indeed, no particular conduct of petitioners with regard to sitting on the sidewalk was made a question for the jury under the court's instructions. The jurors might have credited petitioners' testimony that they were thrown involuntarily onto the sidewalk and restrained there by the police, and yet convicted them for the "doing or saying or both of that which offends, disturbs, incites or tends to incite a number of people gathered in the same area." (A. 155 [Tr. 375-376].)

These considerations underline the solid procedural reason why this Court has many times reversed criminal convictions upon charges found to be constitutionally impermissible, even though the facts of record might have supported a jury verdict convicting the defendants of some other, constitutionally allowable offense. *E.g.*, *Edwards v. South Carolina*, 372 U.S. 229, 236 n. 11 (1963); *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 91-92 (1965); *Gregory v. City of Chicago*, 394 U.S. 111, 112 (1969); *Street v. New York*, 394 U.S. 576, 580-581 (1969). In *Garner v. Louisiana*, 368 U.S. 157 (1961), the Court set aside breach-of-the-peace convictions and declined to consider whether the record would have supported charges of trespass, saying: "[W]e cannot be concerned with whether the evidence proves the commission of some other crime, for it is . . . a denial of due process to send an accused to prison following conviction for a charge that was never made." (*Id.*, at 164.) And see *De Jonge v. Oregon*, 299 U.S. 353, 362 (1937). This is elemental, since "notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." *Cole v. Arkansas*, 333 U.S. 196, 201 (1948).

But there is an equally fundamental substantive reason that also dictates this method of adjudication in First Amendment controversies, and particularly in demonstration cases. Demonstrations classically involve activity that has both "speech" and "nonspeech" components. "This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First

Amendment freedoms. . . .” *United States v. O’Brien*, 391 U.S. 367, 376 (1968). See *Cameron v. Johnson*, 390 U.S. 611, 617 (1968); *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 313-314 (1968). But those limitations are permitted only where a government, by its legislation, does in fact assert its justifying interest in the regulation of the nonspeech component, see *Cox v. Louisiana*, 379 U.S. 536 (1965); *Gregory v. City of Chicago*, 394 U.S. 111, 117-121 (1969) (opinion of Mr. Justice Black); where the application of the legislation is made to depend upon legal elements and factual issues relevant to that interest, see *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 314-315 (1968); and where “the alleged governmental interest in regulating conduct [does not arise] . . . because the communication allegedly integral to the conduct is itself thought to be harmful” and therefore sought to be regulated. *United States v. O’Brien*, 391 U.S. 367, 382 (1968). We have no doubt, for example, that a State could constitutionally forbid the distribution of leaflets by a man with a communicable disease. But that would not permit conviction even of a smallpox carrier under a statute making it a crime to disseminate seditious writings.

This concept is absolutely indispensable to the proper accommodation of legitimate government regulation of conduct with the freedom of speech that the First Amendment guarantees. It has been recognized most conspicuously, perhaps, in licensing cases. There, the law is clear that a State may constitutionally require a license for a parade, in order to serve the legitimate state concern of traffic control. *Cox v. New Hampshire*, 312 U.S. 569 (1941). But it is equally clear that the standards for issuance of a license

must in fact relate to traffic-control concerns; and that under guise of traffic control a State may not confer upon the permit issuer a power to censor the ideology of paraders. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969). The same principle emerges in criminal cases not involving licensing. A State may constitutionally prohibit the obstruction of its sidewalks, even by placard-bearing demonstrators, *cf. Cameron v. Johnson*, 390 U.S. 611 (1968); but it may not cast the prohibition in terms which—because insufficiently focused on obstruction—serve as instruments of ideological control. *Cox v. Louisiana*, 379 U.S. 536 (1965).

Preservation of that principle requires close scrutiny by the Court to assure that any state criminal statute, charge or conviction which may overreach activity protected by the First Amendment actually stands on grounds consistent with the Amendment. If it does not—if it has impermissibly seized upon incidents of speech or conduct protected by the Amendment—it must be set aside even though other incidents of the same speech or conduct might constitutionally have been made the basis of state regulation and punishment. Precisely that sort of scrutiny is demanded in the present case. And we should be clear that, in saying so, we need not rely in any part upon the assumption that a sit-in in a recruiting center or a sit-down on a sidewalk would be “labeled ‘speech’” for First Amendment purposes. See *United States v. O’Brien*, 391 U.S. 367, 376 (1968). For, as petitioners’ case went to the jury, there was other evidence of unquestionable “speech”—petitioners’ marching in the picket line with placards; petitioners’ singing “We shall overcome,” for example—upon which conviction might have been based in part. See *Street v. New York*, 394 U.S. 576 (1969).

So we think that the issues here are *not* whether petitioners could constitutionally have been convicted for refusing to leave the Recruiting Station on request, *cf. Adderley v. Florida*, 385 U.S. 39 (1966), or for obstructing the sidewalk outside, *cf. Cameron v. Johnson, supra*. Petitioners were not charged with any such offenses; their trial was not upon issues raised by any such offenses; and the elements of no such offenses were submitted to the jury. See *Gregory v. City of Chicago*, 394 U.S. 111, 112 (1969). The charge against them, the issues framed for trial, and the submission to the jury were all concerned exclusively with the offense of disorderly conduct, defined disjunctively as "the doing or saying or both of that which offends, disturbs, incites or tends to incite a number of people gathered in the same area," or refusing "to obey a policeman's command to move on when not to do so may endanger the public peace." (A. 155-156 [Tr. 375-376].) The questions here are whether *that* charge is constitutional: on its face, as applied to petitioners, and as administered through the jury instructions given at their trial.

One other introductory point is required by the disjunctive character, just mentioned, of the offense of disorderly conduct under Md. CODE ANN., Art. 27, § 123, as authoritatively construed by the Maryland courts and submitted to petitioners' jury. Under the trial court's instructions, both theories of disorderly conduct were submitted as independently sufficient bases of conviction. (A. 155-156 [Tr. 375-376].) The jury verdict was the general one of "guilty." Therefore, under settled principles, petitioners' convictions must be reversed if *either* theory was constitutionally impermissible. *Williams v. North Carolina*, 317 U.S. 287 (1942); *Stromberg v. California*, 283 U.S. 359

(1931); *Thomas v. Collins*, 323 U.S. 516 (1945); *Street v. New York*, 394 U.S. 576 (1969); cf. *Gregory v. City of Chicago*, 394 U.S. 111 (1969); *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965).

II.

Article 27, § 123 Is Unconstitutional on Its Face by Force of the First and Fourteenth Amendments.

The operative portion of Art. 27, § 123 charged to the jury below as the measure of petitioners' guilt punishes "Every person who shall be found . . . acting in a disorderly manner to the disturbance of the public peace, upon any public street or highway" (A. 155 [Tr. 375]; see p. 11, *supra*.) As indicated by the Court of Special Appeals below (A. 175-177), authoritative Maryland constructions of this language announce two distinct theories of disorderly-conduct liability. The first, expounded in *Drews v. State*, 224 Md. 186, 188, 167 A.2d 341, 343-344 (1961),¹² was submitted to petitioners' jury as follows:

" . . . disorderly conduct is the doing or saying or both of that which offends, disturbs, incites or tends to incite a number of people gathered in the same area. It is conduct of such nature as to affect the peace and quiet of persons who may witness it and who may be disturbed or provoked to resentment because of it." (A. 155 [Tr. 375-376].)

¹² *Remanded on other grounds*, 378 U.S. 547 (1964), *aff'd on remand*, 236 Md. 349, 204 A.2d 64 (1964). The *Drews* case arose under an earlier version of Art. 27, § 123, having language virtually identical to that of the section as it was in force at the time of the offense charged against petitioners.

This we shall call the disturbing-the-public theory.

The second theory, or disobeying-a-police-order theory, derives from *Drews, supra*; from *Sharpe v. State*, 231 Md. 401, 404, 190 A.2d 628, 630 (1963); and from *Harris v. State*, 237 Md. 299, 303, 206 A.2d 254, 256 (1965). As charged below it is that:

"... A refusal to obey a policeman's command to move on when not to do so may endanger the public peace, may amount to disorderly conduct." (A. 155-156 [Tr. 376].)¹¹

Apart from a reading of the statute, these two passages constituted the only definition of disorderly conduct given to petitioners' jury. The Court of Special Appeals approved the passages without further elaboration or explanation (A. 175-178 [S.O. 5-6]), and so they continue to provide the entire definition of disorderly conduct under Art. 27, §123. We submit that each passage, and the theory of criminal liability that each embodies, is unconstitutional.

¹¹ The formulation in the *Harris* opinion is considerably narrower than this one, which the trial court took from *Drews*. In *Harris*, the Court of Appeals said that: "A failure to obey a *reasonable and lawful* request by a police officer *fairly made* to prevent a disturbance to the public peace constitutes disorderly conduct." (Emphasis added.) Petitioners would have no quarrel with the constitutionality of the *Harris* formula. Indeed, it was the theory of petitioners' requested instructions (pp. 6-7, *supra*), which the court below refused to give.

A. THE PROHIBITION OF DOING OR SAYING THAT WHICH OFFENDS OR DISTURBS OTHER PEOPLE FAILS TO GIVE FAIR WARNING OF WHAT IS PROHIBITED, DELEGATES CENSORIAL DISCRETION TO THE POLICE AND THE JURY, HAS AN OVERBROAD DETERRENT EFFECT ON PROTECTED FREE EXPRESSION, AND ALLOWS THE IMPOSITION OF CRIMINAL LIABILITY SOLELY ON THE BASIS OF PUBLIC DISAGREEMENT WITH EXPRESSED IDEAS.

Maryland's disturbing-the-public theory of disorderly conduct exhibits in extreme measure every vice that has ever caused this Court to strike down penal legislation as vague or overbroad:

1. "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process. . . ." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).¹⁴ Art. 27, § 123, as construed to prohibit "the doing or saying or both of that which offends, disturbs, incites, or tends to incite, a number of people gathered in the same area" and "affects the peace and

¹⁴ In *Connally*, this Court voided a penal statute requiring that state contractors pay their laborers "not less than the current rate of per diem wages in the locality where the work is performed." The Court held that this reference of criminal liability to an ill-defined standard of public usage rendered the law impermissibly vague. Art. 27, § 123, of course, refers liability to a still more ill-defined standard of public *taste*. Moreover, it is significant that the *Connally* statute dealt with a limited class of people (state contractors) dealing in a limited and specified sort of activity (hiring workers), whereas the present statute applies to everyone and potentially to all public activity, including conduct protected by the First Amendment. Cf. *Boyce Motor Lines Inc. v. United States*, 342 U.S. 337 (1952).

quiet of persons who may be disturbed and provoked to resentment because of it," is such a statute.

This kind of prohibition "involves calculations as to the boiling point of a particular person or a particular group, not an appraisal of [the actor's conduct or] . . . comments *per se*." *Ashton v. Kentucky*, 384 U.S. 195, 200 (1966). What will cause "offense," "disturbance," or "resentment" on the part of persons in an area is incalculably variable. Actions and expressions that some will find admirable, interesting, or at least innocuous will upset, bother, or irritate others. Some will be offended or disturbed by anti-war demonstrations; some by anti-anti-war demonstrations; some by any demonstrations at all; some by college students demonstrating, or by college students *simpliciter*, or by college students singing "We shall overcome"; some by anyone singing "We shall overcome," or by anyone singing on the sidewalk, or by anyone sitting on the sidewalk singing, or by only anti-war demonstrators sitting on the sidewalk singing. The list and the possible permutations of all potential public peeves are imponderable. Yet Art. 27, §123 defines the offense of disorderly conduct entirely in terms of public irritation or irritability. An actor is required to predict the emotional reception of the public to his acts. If he guesses wrong and gets an unsympathetic response where a sympathetic one was hoped for, he is criminally liable.

The emotional reaction of the public is both necessary and sufficient to make out the offense. Placing a delivery cart athwart the sidewalk might or might not do it, depending upon the patience of the passers-by. If a demonstrator's body is placed on the same sidewalk, liability turns on the ideology of the spectators. Had the Green-

mount Avenue crowd attracted by petitioners' demonstration been doves instead of hawks—or, perhaps, had there been more doves and fewer hawks—petitioners would not have been guilty of disorderly conduct. Surely, no one may thus “be required at peril of . . . liberty . . . to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.” *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).¹⁸

2. It will be objected that this description of the statute's force is exaggerated and far-fetched. And so perhaps it is, as a matter of daily operation. Not all public peevishness, by any means, is likely to be summarily arrested and brought to book. But this is so simply because Art. 27, § 123 neither is nor can be uniformly enforced according to its terms.

Selective enforcement saves the statute from absurdity, but makes it no less constitutionally objectionable. To the contrary, it is a matter of independent constitutional concern that the vagueness of the statute, as construed, permits and requires the police to make their own arbitrary

¹⁸ The *Lanzetta* case involved a statute that punished persons having a criminal record and not engaged in any lawful occupation who were known to be members of a “gang” of two or more persons. The State argued that such dragnet legislation was necessary for effective crime control, in view of the variousness of “gang” activities that threaten harm. This is not unlike the argument frequently put forward in support of vague disorderly conduct laws, which must be general, we are told, because of the variousness of ways in which persons may disturb others. While it is undisputed that maintaining order in the public streets, like crime control, is a legitimate legislative purpose, *Lanzetta* makes plain that no argument of necessity can justify a penal statute which fails to inform people in reasonably clear terms what is being prohibited.

trary and censorial judgment the sole basis of arrest. Under the Fourteenth Amendment, "lawmaking is not entrusted to the moment-to-moment judgment of the policeman on his beat." *Gregory v. City of Chicago*, 394 U.S. 111, 120 (1969) (opinion of Mr. Justice Black). See *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965); *Cox v. Louisiana*, 379 U.S. 536 (1965). Yet, by broadly prohibiting all actions which offend or disturb the public, Art. 27, § 123 inevitably gives the policeman a power and responsibility to determine whether sufficient numbers of persons in an area have been disturbed, whether their disturbance is warranted and proper, and, presumably, whether it is trivial or substantial.

We do not mean to suggest that the statute on its face calls for these judgments. But to conceive of its administration without them is other-worldly. Judgments of this kind are made hourly and must be made hourly if half the population is not to be jailed for disturbing, offending, or provoking the resentment of the other half.¹⁸ Such is the ineluctable consequence of the statute at its best; while at its worst it is "susceptible of sweeping and improper application," *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963), furnishing a convenient tool for "harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure," *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940).

3. The constitutional concern that police discretion be confined by statutes having some reasonable degree of specificity is especially compelling when that discretion may overreach activity that is protected by the First

¹⁸ Cf. *Territory of Hawaii v. Anduha*, 48 F.2d 171 (9th Cir. 1931).

Amendment. *E.g.*, *Hague v. C.I.O.*, 307 U.S. 496 (1939); *Kunz v. New York*, 340 U.S. 290 (1951); *Niemotko v. Maryland*, 340 U.S. 268 (1951). The constitutional vice of delegating broad discretion to the police in First Amendment areas was the ground of decision in *Cox v. Louisiana*, 379 U.S. 536 (1965). There a statute prohibiting the obstruction of "the free, convenient and normal" use of any sidewalk or street was, like Art. 27, § 123, plainly too broad for uniform enforcement. It was selectively administered and according struck down:

"[T]he lodging of such broad discretion in a public official allows him to determine which expressions of view will be permitted and which will not. This thus sanctions a device for the suppression of the communication of ideas and permits the official to act as a censor . . . It is clearly unconstitutional to enable a public official to determine which expression of view will be permitted and which will not or to engage in invidious discrimination among persons or groups either by use of a statute providing a system of broad discretionary licensing power or, as in this case, the equivalent of such a system by selective enforcement of an extremely broad prohibitory statute." (*Id.*, at 557-558.)

4. A delegation of this kind of sweeping authority to the police is additionally pernicious when a statute is cast in terms of public reaction. In a situation involving a confrontation of groups of people expressing divergent points of view, such a statute calls the police to the aid of those who are most quick to anger and most easily "disturbed," "offended" or "provoked to resentment." Thus the statute

authorizes precisely what the Constitution condemns: the subordination of constitutional rights of free expression to the intolerance and hostility of those who find the expression offensive. In the plainest terms, the police are encouraged to arrest the demonstrator on the basis of the heckler's reaction. But see *Wright v. Georgia*, 373 U.S. 284, 292-293 (1963); *Watson v. City of Memphis*, 373 U.S. 526 (1963); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Terminiello v. City of Chicago*, 337 U.S. 1 (1949).

5. Art. 27, § 123 is additionally infirm because it allows the jury to create its own standard of guilt and to convict the proponents of unpopular ideas simply because the jury finds those ideas provoking or distasteful. Even in matters where sensitive First Amendment rights are not threatened, the Due Process Clause protects a criminal defendant against such vagaries. *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966). The allowable scope of jury discretion in the First Amendment area is, of course, far narrower. It was for this reason that the Court, in *Herndon v. Lowry*, 301 U.S. 242 (1937), reversed the conviction of a Communist Party organizer under an insurrection statute. The statute, as construed, allowed conviction if the jury believed that the defendant intended an insurrection to happen at any time within which he might reasonably expect his influence to be directly operative. This Court struck down the statute on the ground that it "licenses the jury to create its own standard in each case. . . . No reasonably ascertainable standard of guilt is prescribed. So vague and indeterminate are the boundaries thus set to the freedom of speech and assembly that the law necessarily violates the guarantees of liberty embodied in the Fourteenth Amendment." (*Id.*, at 263-264.)

Under Art. 27, § 123, the license given the jury is far greater than that condemned in *Herndon*. The jurors are required to find only that some persons have been disturbed or offended by a defendant's conduct or opinions. In petitioners' case no limitation was placed upon this theory of liability; and the trial court refused to give instructions proposed by the defense which would have informed the jury that it could not convict merely because some spectators disagreed with the ideas that petitioners expressed.

6. In arguing that Art. 27, § 123 is unconstitutional because it fails to give fair warning of what is prohibited and because it delegates unfettered discretion to law enforcement officers and to juries, we have adverted to the free speech guarantees of the First Amendment. This Court's decisions firmly establish, we believe, that uniquely stringent standards of specificity and precision are demanded of legislation that potentially overreaches federal freedoms of expression. *E.g.*, *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Ashton v. Kentucky*, 384 U.S. 195 (1966), and authorities cited; *United States v. National Dairy Prods. Corp.*, 372 U.S. 29, 36 (1963). The reasons are several.

First, the unclarity of the line of constitutional protection itself occasions a further lack of fair warning in a due process sense. An actor is required to speculate concerning the extent to which the protection of the First Amendment will prohibit a conviction under the statute. See *Garner v. Louisiana*, 368 U.S. 157, 185, 207 (1961) (Mr. Justice Harlan, concurring).

Second, the discretion allowed law enforcement officers and juries by vague and overbroad statutes in this area has the effect of inaugurating precisely such a regime of censorship—of licensing speech depending upon approval of its content—as the English had experienced and the First Amendment was intended to forbid forever in this country. See *Marcus v. Search Warrant*, 367 U.S. 717 (1961).

Third, and most important, there is the ever-present danger that persons will refrain from protected expression rather than run the risk of incurring criminal liability under a wide-sweeping penal enactment. The First Amendment condemns statutes which are so vague that the uncertainty of the scope of their application may deter the exercise of protected speech, expression, petition or assembly. *Dom-browski v. Pfister*, 380 U.S. 479 (1965).

"[S]tandards of permissible statutory vagueness are strict in the area of free expression. . . . The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchannelled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. . . . These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." (*N.A.A.C.P. v. Button*, 371 U.S. 415, 432-433 (1963).)

A severe deterrent effect on the expression of unpopular views is inevitable when a statute, like Art. 27, § 123, casts an offense in vague terms of public reaction rather than in terms of any specified or ascertainable actions. If words or conduct disturb or incite, the offense is complete. But as Mr. Justice Holmes said in *Gitlow v. New York*, 268 U.S. 652, 673 (1925), "Every idea is an incitement"; and a major function of the First Amendment is to assure the protection of the expression of ideas which may offend, disturb or incite those people to whom they are communicated. In a real sense the need and the value of the First Amendment is greatest when the ideas expressed are most likely to offend or disturb; and for this reason, the Court has invariably found that statutes which define a crime in terms of public reaction to an idea are unconstitutional on their face.

The issue was raised in *Terminiello v. City of Chicago*, 337 U.S. 1 (1949) where the Court struck down a definition of breach of the peace that is strikingly similar to the instruction given the jury in the present case. In *Terminiello*, the jury was charged that breach of the peace included speech that "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance." But said the Court:

"[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and pre-conceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why

freedom of speech, though not absolute, . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. . . . There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas by legislatures, courts, or dominant political or community groups." (337 U.S., at 4-5.)

Art. 27, § 123, as construed, flouts the constitutional rule of *Terminiello*. A prohibition of words or actions which may offend, disturb, incite or provoke to resentment is quite as broad as a prohibition of speech which stirs the public to anger, invites dispute, brings about a condition of unrest or creates a disturbance. *Edwards v. South Carolina*, 372 U.S. 229 (1963), struck down a similar breach-of-the-peace conception because "The Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views . . . [and a] 'conviction resting on any of those grounds may not stand.'" (*Id.*, at 237-238.)

In *Cox v. Louisiana*, 379 U.S. 536 (1965), the offense of breach of the peace was defined as "to agitate, to arouse from a state of repose, to molest, to interrupt, to hinder, to disquiet." (*Id.*, at 551.) The Court held that this definition "would allow persons to be punished merely for peacefully expressing unpopular views. . . . Therefore, as in *Terminiello* and *Edwards* the conviction . . . must be reversed as the statute is unconstitutional in that it sweeps within its broad scope activities that are constitutionally protected free speech and assembly. Maintenance of the op-

portunity for free political discussion is a basic tenet of our constitutional democracy." (*Id.*, at 551-552.) So the Court has held again and again. Indeed, no breach-of-the-peace construct, however worded, has survived this Court's scrutiny as applied to conduct within the wide ambit of expression. In addition to *Terminiello*, *Edwards* and *Cox*, see *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Fields v. South Carolina*, 375 U.S. 44 (1963); *Henry v. City of Rock Hill*, 376 U.S. 776 (1964); cf. *Niemotko v. Maryland*, 340 U.S. 268 (1951).¹⁷ "These decisions recognize that to make an offense of conduct which is 'calculated to create disturbances of the peace' leaves wide open the standard of responsibility. . . . This kind of criminal [statute] . . . 'makes a man criminal simply because his neighbors have no self-control and cannot refrain from violence.' Chafee, *Free Speech in the United States* 151 (1954)." *Ashton v. Kentucky*, 384 U.S. 195, 200-201 (1966).

The cited decisions unavoidably condemn Art. 27, § 123. We submit it is facially unconstitutional.

¹⁷ In *Feiner v. New York*, 340 U.S. 315 (1951), the constitutionality of the New York statute on its face was not challenged. Similarly, in the "fighting words" case, *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), the only issue brought to the Court was whether Chaplinsky's particular utterance was constitutionally protected—as, of course, it was not.

B. THE PROHIBITION OF FAILING TO OBEY THE ORDER OF AN OFFICER WHEN NOT TO DO SO MAY ENDANGER THE PUBLIC PEACE, GIVES THE POLICE OVERLY BROAD DECISION-MAKING POWERS, ALLOWS THEM TO CENSOR THE EXPRESSION OF OPINIONS ON THE PUBLIC STREETS, AND FAILS TO REQUIRE THE POLICE TO PROTECT SPEAKERS EXERCISING FIRST AMENDMENT RIGHTS FROM HOSTILE PUBLIC REACTION.

1. The second head of the trial court's submission to the jury is as constitutionally deficient as the first. This theory—permitting conviction for “refusal to obey a policeman's command to move on when not to do so may endanger the public peace” (A. 155-156 [Tr. 376])—is virtually identical to the formulation struck down in *Cox v. Louisiana*, 379 U.S. 536, 551 (1965):

“ . . . The statute at issue in this case, as authoritatively interpreted by the Louisiana Supreme Court, is unconstitutionally vague in its overly broad scope. The statutory crime consists of two elements: (1) congregating with others ‘with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned,’ and (2) a refusal to move on after having been ordered to do so by a law enforcement officer. While the second part of this offense is narrow and specific, the first element is not.”

2. While this is enough to condemn the police-order theory, it is not all that is wrong with it. Petitioners requested instructions which would have told the jury, *first*, that liability could be imposed only for disobedience of a “reasonable and lawful” police order; *second*, that a police order to move on is reasonable and lawful only “if it is

made to prevent an imminent public disturbance, and if it is reasonably necessary in order to prevent such a disturbance," and, *third*, that "disturbance" means "physical violence, or the attempt to use physical violence," and not merely "an episode of shouting or singing or name-calling not calculated to spill over into imminent violence." (See pp. 6-7, *supra*.) All of these requests were refused; so, as the case went to the jury, the failure to obey *any* police order to move along was a crime, if only that failure might endanger the undefined "public peace." This

"... part of [the statute] ... says that a person may stand on a public sidewalk in [Maryland] ... only at the whim of any police officer. ... The constitutional vice of so broad a provision needs no demonstration. It 'does not provide for government by clearly defined laws, but rather for government by moment-to-moment opinions of a policeman on his beat.' ... Instinct with its ever-present potential for arbitrarily suppressing First Amendment liberties, that kind of law bears the hallmark of a police state." (*Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90-91 (1965).)

The *Shuttlesworth* case itself did not, on its facts, involve the exercise of First Amendment freedoms. It was decided on the fundamental ground that a State simply may not constitutionally give policemen arbitrary power to order citizens about the streets. The Fourteenth Amendment protects the general right of citizens to use the public streets unmolested by harassing and unjustified police actions and orders, and the First Amendment protects the more specific right of citizens to use the streets as a forum for the expression of ideas and opinions. "... Wherever the title of

streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."²²

It is not disputed that the State has a right and responsibility to regulate use of city streets and other facilities to assure the safety and convenience of the people. This responsibility may be exercised through specific prohibitory laws, such as traffic regulations, or through delegation of limited licensing discretion to administrative officials, "under properly drawn statutes or ordinances, concerning the time, place, duration, or manner of use of the streets for public assemblies." *Cox v. Louisiana*, 379 U.S. 536, 558 (1965). However, the use of the public streets may not be regulated by either statutes which are vague and sweeping in their terms or by statutes which grant unlimited discretion to administrative officials.²³ If the

²² *Hague v. C.I.O.*, 307 U.S. 496, 515-516 (1939) (opinion of Mr. Justice Roberts). Accord: *Jamison v. Texas*, 318 U.S. 413, 416 (1943); *Amalgamated Food Employees Union v. Logan Valley Plaza Inc.*, 391 U.S. 308, 315 (1968).

²³ This Court has most frequently considered the problem of overly broad delegation of power to administrative officials in the context of statutes that require that speakers or demonstrators obtain licenses before using the public streets and parks to express their opinions. In *Kunz v. New York*, 340 U.S. 290 (1951), the Court reversed a conviction for failure to obtain a license to speak, even though it was not disputed that on prior occasions the speaker had ridiculed and denounced the religious beliefs of others and had caused great disorder by holding meetings in the busy streets of New York City. The conviction could not stand, even though the State would have had legitimate reason to deny Mr. Kunz a license

Maryland disorderly conduct statute is construed to mean that any refusal to obey a policeman's order is presumed to endanger the public peace,²⁴ it is quite specific but it is unconstitutional under the rule of *Shuttlesworth v. City of Birmingham, supra*. If the statute is construed to mean that failure to obey a police order is punishable whenever a jury finds in fact that "the public peace may be endangered," it is unconstitutionally vague and sweeping under *Cox v. Louisiana, supra*. We see no alternative to these constructions in the form in which petitioners' case was submitted to the jury.

3. But the police-order theory, as charged below, has an additional vice. It permits the police to call a halt to a demonstration, and permits the jury to convict the demonstrators, on the sole ground that their message disturbs those who witness it. This theory fails to recognize the cardinal point of the First Amendment—embodied in several defense requests for instructions which were refused (see pp. 7-10, *supra*)—that the expression of ideas will

under a narrowly drawn statute, because the Court had "consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places." *Id.* at 294. See *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Schneider v. State*, 308 U.S. 147 (1939); *Hague v. C.I.O.*, 307 U.S. 496 (1939); *Lovell v. City of Griffin*, 303 U.S. 444 (1938); *Saia v. New York*, 334 U.S. 558 (1948); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969). And in *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965), and *Cox v. Louisiana, supra*, the Court made plain that the rule of the licensing cases applies equally to broadly drawn state prohibitory statutes that allow *de facto* (although not *de jure*) licensing power to the police.

²⁴ *Sharpe v. State*, 231 Md. 401, 190 A.2d 628 (1963) may stand for this proposition.

often arouse hostile reactions and that, when this happens, the police have an obligation first to attempt to protect those who are expressing unpopular ideas, before ordering them off the street or arresting them.

In *Cox v. Louisiana*, *supra*, for example, police testified that they feared violence to demonstrators from a crowd of onlookers. The Court replied that, "Conceding this was so, the 'compelling answer . . . is that constitutional rights may not be denied simply because of hostility to their assertion or exercise.' *Watson v. Memphis*, 373 U.S. 526, 535." (379 U.S. at 550.) See also *Wright v. Georgia*, 373 U.S. 284, 292 (1963) ("The command was also violative of petitioners' rights because . . . the possibility of disorder by others . . . could not justify [their] exclusion . . . from the park").

Maryland's police-order theory of disorderly conduct entirely ignores by its broad "breach of the peace" conception the constitutional duty of police to protect the free expression of ideas. If the ideas expressed by petitioners were sufficiently opposed to the opinions of a majority of the people on Greenmount Avenue to necessitate police protection, then the Constitution demanded that they be given that protection insofar as practicable. This issue, which petitioners' requests to charge would have submitted to the jury, was swept aside by the courts below in their view of Art. 27, § 123. We submit that a statute so construed that it authorizes the police, in the interest of preserving the public peace, to arrest those engaged in the expression of political ideas rather than first attempting by other practicable means to keep the peace, is unconstitutional. *Edwards v. South Carolina*, 372 U.S. 229 (1963).

II.

As Applied to Petitioners on the Record of This Case, Article 27, § 123 Abridges the Rights of Free Speech, Petition and Assembly, Guaranteed by the First and Fourteenth Amendments.

A. ARTICLE 27, § 123, PROHIBITING THE DOING OR SAYING OF THAT WHICH DISTURBS OR OFFENDS PEOPLE IN THE AREA, IS UNCONSTITUTIONAL AS APPLIED TO PETITIONERS BECAUSE THE RECORD SHOWS THAT ANY "DISTURBANCE" OCCASIONED TO PEOPLE IN PETITIONERS' AREA AROSE EXCLUSIVELY FROM DISAGREEMENT WITH THE IDEAS THAT THEY EXPRESSED.

1. The arresting officers testified that petitioners were arrested because the crowd of spectators was "hostile"; and, on the whole record, this hostility was the only evidence of the public "disturbance," "offense," "incitement," or "resentment" required to convict. But the record also clearly shows that whatever disturbance, offense, resentment or other reaction may have been aroused in the spectators was entirely based on a disagreement with the petitioners' expression of their views on Viet Nam.

In the testimony of the arresting officers, a major indication of the hostility of the bystanders was the fact that there were two Marines present who seemed to be angry. Lt. DiPino testified that the Marines were angry because the petitioners were opposed to the war.²⁵ Sgt. DiCarlo,

²⁵ "Q. What specific action did the defendants commit that made the crowd hostile? What did they do, in other words, in any way made the crowd hostile? . . .

"A. I don't know. Like I said before, if you want me to repeat—by looking at the Marine and seeing how pale he was. It was one of the indications he was angry.

[footnote 25 cont'd on next page]

when asked to describe the hostility of the crowd, also responded by stating that there were military men present."

The second major sign that the crowd was disturbed and offended was that they began to shout "Bomb Hanoi." (A. 46, 58 [Tr. 90, 114].) Lt. DiPino testified that he "arrested [petitioners] . . . also to protect them from being hurt" (A. 60 [Tr. 117]) and that he knew they needed "protection" because the crowd of spectators and the demonstrators were "debating about the Viet Cong situation." (A. 47-48 [Tr. 93].) "[T]hey were debating back and forth about Bomb Hanoi and different things" (A. 61 [Tr. 119]). "They were protesting and the other ones were protesting against them." (A. 46 [Tr. 90].)

Prosecution witnesses were clear that they did not hear any abusive language from the petitioners. (A. 57-58, 150 [Tr. 112, 351].) Lt. DiPino stated that the crowd was not angry about the failure of petitioners to move from the sidewalk:

"Q. You mean the crowd was mad at them because they wouldn't move?

"A. Because they were marching in protest.

"Q. Angry about what?

"A. Of what was taking place, he was against. Like I said to you before.

"Q. You said the fact these people were protesting the war in Viet Nam and—

"A. And he was a Marine, yes." (A. 64-65 [Tr. 127-128].)

"They started to shout things like 'Let us get to them, we'll take care of them.' There were two United States Marines. We had to hold them. We sent them across the street and also men from the Navy that we sent across the street. And the crowd did gather in around them. So it did start to get a little wild." (A. 39 [Tr. 73].)

"Q. About what?

"A. About the Viet Cong. Against the recruiting station for not allowing signs." (A. 65 [Tr. 130].)

And when asked if any of the hostility of the crowd could be attributed to the actions of petitioners, the officer said, "Yes, they [the crowd] were protesting against them. They didn't like what they were giving out in literature." (A. 62 [Tr. 123].)

Thus it is clear from the testimony of the prosecution witnesses that the only basis for offense, resentment and disturbance felt by the crowd was a disagreement with the ideas expressed by petitioners. To punish them for causing that kind of "disturbance" is to punish them for the crowd's rejection of their anti-war beliefs. Underlying such a conviction, Art. 27 § 123 becomes a bald instrument for the suppression of the freedom of expression protected by the First Amendment.

2. Of course, Lt. DiPino testified that he did not "take sides" (A. 65 [Tr. 130]), and that he felt compelled to "lock them [petitioners] up for their protection" (A. 65 [Tr. 129]). He also testified that he had attempted to disperse the crowd. (A. 51 [Tr. 100].) But State's witness Fogarty did not hear any attempt to disperse the crowd (A. 149-150 [Tr. 350-351]); nor did any of the defense witnesses who were in that crowd (A. 118, 119, 122, 126, 132-133 [Tr. 257, 261, 268-269, 277, 293].) Other than the chant of "Bomb Hanoi," there were apparently only two instances of verbal threats directed against petitioners; and no one of the "hostile" spectators ever tried to charge them, reached out physically to assault them, or assault any of the dozens of other placard-carrying demon-

strators mingling in the crowd. (See pp. 18-19, *supra*.) At all times, concededly, there was adequate police protection on the scene. (See pp. 19-20, *supra*.)

On similar records, this Court has not hesitated to reject factually unsubstantiated professions of policemen that they sensed or anticipated violence. *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Wright v. Georgia*, 373 U.S. 284 (1963); *Henry v. City of Rock Hill*, 376 U.S. 776 (1964). When "a claim of constitutionally protected right is involved, it 'remains [the Court's] . . . duty in a case such as this to make an independent examination of the whole record.'" *Cox v. Louisiana*, 379 U.S. 536, 545 n. 8 (1965). Here, such an examination must lead irresistibly to two conclusions: (1) that the hostility of the crowd of spectators was based entirely on disagreement with the petitioners' expressed ideas; and (2) that the police thereupon acted to suppress the ideas rather than undertaking the achievable, if more burdensome, job of controlling the crowd to the extent that was needed in order to "protect" petitioners.

3. These conclusions compel reversal of the convictions. "[A] function of free speech under our system of government is to invite dispute."²⁷ That petitioners were successful in inviting dispute cannot constitutionally support their punishment. Public disturbance is often a necessary concomitant of the expression of unpopular ideas, and it was the obligation of the police at the recruiting station to protect the petitioners in the exercise of First Amendment freedoms. Instead, petitioners were arrested and "convicted upon evidence which showed no more than that the

²⁷ *Terminiello v. City of Chicago*, *supra*, 337 U.S. at 4.

opinions which they were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection." *Edwards v. South Carolina*, 372 U.S. 229, 237 (1963). We have noted above the obvious point that: "'constitutional rights may not be denied simply because of hostility to their assertion or exercise.'" ²⁸ "[T]he possibility of disorder by others cannot justify exclusion of persons from a place if they otherwise have a constitutional right . . . to be present." ²⁹

4. In making this submission, we do not "challenge the principle that there are special, limited circumstances in which speech is so interlaced with burgeoning violence that it is not protected by the broad guaranty of the First Amendment." *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175, 180 (1968). We are quick to concede, for example, that a State's interest in maintaining public order may justify the arrest of a speaker who produces a hostile reaction through the use of "fighting words." *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). But the record here shows no "fighting words" by petitioners.³⁰ Rather, it aligns petitioners' case with the many in which *Chaplinsky* has been thought obviously distinguishable.³¹

²⁸ *Cox v. Louisiana*, *supra*, 379 U.S. at 551; *Watson v. City of Memphis*, 373 U.S. 526, 535 (1963).

²⁹ *Wright v. Georgia*, 373 U.S. 284, 293 (1963).

³⁰ Similarly, *Feiner v. New York*, 340 U.S. 315 (1951), is far off point. *Feiner* was whipping his own supporters up to violence, as the Court noted when distinguishing *Feiner* in *Edwards v. South Carolina*, *supra*, 372 U.S. at 236 and *Cox v. Louisiana*, *supra*, 379 U.S. at 551. Nothing of the sort is involved here.

³¹ *Terminiello v. City of Chicago*, *supra*, at 3; *Cox v. Louisiana*, *supra*, at 551; *Edwards v. South Carolina*, *supra*, at 236; *Niemotko v. Maryland*, *supra*, at 281; cf. *New York Times Co. v. Sullivan*, 376 U.S. 254, 293, 296 (1964) (Mr. Justice Black, concurring).

We have also said at pp. 27-29, *supra*, that we do not challenge or deny Maryland's power to keep its sidewalks unobstructed, as well as peaceful. But the power against obstruction has nothing to do with this case. Petitioners have been convicted *only* of the crime of "disturbing," and "offending" other people, and of "provoking [their] resentment." The record is plain that the *only* disturbance, offense or resentment caused by the petitioners arose when a crowd of spectators disagreed with their anti-Viet Nam views, and that then the police arrested petitioners in preference to controlling the crowd. As applied to these facts, Art. 27, § 123 has the effect, and the exclusive effect, of suppressing expression protected by the First Amendment.

B. THE CONVICTION OF PETITIONERS FOR REFUSING TO OBEY THE ORDER OF AN OFFICER IS UNCONSTITUTIONAL BECAUSE THE RECORD PLAINLY SHOWS THAT THERE WAS NO LEGAL JUSTIFICATION FOR THE ORDER IN THAT THERE WAS NO CLEAR AND PRESENT DANGER OF SUBSTANTIAL PUBLIC DISTURBANCE, AND THAT THE ORDER THEREFORE OPERATED SOLELY TO SUPPRESS THE EXPRESSION OF IDEAS BY PETITIONERS.

We return to the police-order theory of petitioners' conviction. "Obviously, . . . one cannot be punished for failing to obey the command of an officer if that command is itself violative of the Constitution."³² In the present case any alleged order³³ was unconstitutional because: (1) there was

³² *Wright v. Georgia*, 373 U.S. 284, 291-292 (1963).

³³ Whether any such order was given was hotly contested at the trial. (See pp. 17-20, *supra*.) In light of the alternative theories submitted to support conviction, it is impossible to say whether or how the jury resolved the contest.

no evidence of any clear and present danger of disruption or violence; and (2) whatever danger existed was not attributable to the petitioners but arose solely from public hostility to their views.

1. As mentioned above, the primary indication of danger to the public peace as perceived by the arresting officers was the reaction of a couple of Marines. Lt. DiPino testified that he asked the petitioners to leave when he saw that the Marines were "pale in their face" and he therefore feared violence.²⁴ He did not testify that the Marines made any threatening gestures or used any threatening words toward petitioners. Indeed, it appears that the Marines were standing next to picketers who were holding signs protesting the war and made no attempt to harm the picketers. (A. 56, 59-60 [Tr. 110, 115-116].) Petitioner Harding testified without contradiction that "there was a Marine standing within five or six feet of me and there was no police officer between myself and the Marine." (A. 98 [Tr. 210].) "And he was watching me, just looking at me." (A. 96 [Tr. 204].) The Marine made no threatening gestures to him. (A. 84 [Tr. 178].) Another defense witness testified that he had spoken with two uniformed Armed Service people and had given them some literature. (A. 137 [Tr. 302].) While

²⁴ "Q. Then when is the next time you told them to get up?

"A. When I seen there could be violence. Again I asked, when I seen the two Marines that were pale in their face, why if they're not going to get up they can be hurt. I asked them again. They still wouldn't get up.

"Q. Who were these two Marines standing next to?

"A. I don't know who they were.
behind a man carrying one of the signs?

"Q. Suppose I were to tell you one Marine was standing right

"A. It's possible. I said they were intermingled." (A. 59 [Tr. 115-116].)

they were not happy with the demonstration, their reaction did not betoken impending violence."

In addition to testimony concerning the color of the Marines' faces, the arresting officers made general assertions of "hostility" and said that there were a couple of shouts like "Let me get to them; I'll bust him in the mouth." (A. 48 [Tr. 94]). (See p. 18, *supra*.) On the other hand, Lt. DiPino stated that there were no fights anywhere in the crowd after the boys had been placed on the pavement, and that none of the demonstrators was attacked (A. 61 [Tr. 120].) The police officers estimated the size of the crowd at 80 to 100 people (A. 39 [Tr. 73]) and at 50 to 150 people (A. 45-46 [Tr. 89]). This figure included approximately thirty to forty demonstrators. (A. 22, 60-61 [Tr. 30, 118].) There were more than twelve police officers present, and more

"A. . . . I remember handing leaflets to these two servicemen and talking to them about Viet Nam.

"Q. What was their respective response to your handing them a leaflet?

"A. Well they didn't really want to talk about it that much.

"Q. Did they say anything else?

"A. . . . All I remember he didn't want to discuss it. He took the leaflet. I don't remember exactly what he said. He wasn't happy about the demonstration. . . .

"Q. What did he say?

"A. I don't remember exactly. General things about Communists and something.

"Q. What do you mean he wasn't happy about the demonstration?

"A. He didn't act like he was going to do anything. He didn't do anything but he didn't look happy about it.

"Q. Was he sad?

"A. No. He looked angry.

"Q. He looked angry?

"A. Yes, sir. But he didn't—I mean it was a controlled thing, you know, very controlled. He wasn't sure what was happening. This was something knew [sic] to him. I hope he went home and thought about it." (A. 137-138 [Tr. 302-304].)

officers could have been called if they were needed. See pp. 19-20, *supra*.

We note again the highly significant fact that the supporters of the war and the people carrying picket signs protesting the war were intermingled in the crowd. (Pp. 18-19, *supra*.) If any member of the crowd had wanted to attack one of the demonstrators there was ample opportunity to do so. Four defense witnesses who were in the crowd testified that they were carrying signs protesting the war during the entire period that petitioners were on the sidewalk and that no one threatened them, cursed them or made any menacing remarks or gestures to them. (A. 114, 118, 119, 123, 133 [Tr. 249-250, 259, 261, 270, 294].) Another defense witness was identifiable as a protester because he was passing out leaflets, yet no one threatened his safety. (A. 126, 127 [Tr. 276-277, 279].) State's witness Fogarty testified that the people at the back of the crowd were trying to push to the front "to see what was going on," but that no one was trying to go past the police to attack petitioners." (A. 150 [Tr. 351-352].)

2. The danger to the public peace shown on these facts is constitutionally insufficient to justify an order that petitioners leave the street. In this aspect, the case is plainly controlled by *Edwards v. South Carolina*, *supra*; *Thomas v. Mississippi*, 380 U.S. 524 (1965), reversing *Thomas v. State*, 252 Miss. 527, 160 So.2d 657 (1964); and *Fields v. South Carolina*, 375 U.S. 44 (1963), reversing *State v. Fields*, 240 S.C. 366, 126 S.E.2d 6 (1962)."

" The facts in *Fields* are stated in *State v. Brown*, 240 S.C. 357, 126 S.E.2d 1 (1962).

The Court considered a far more volatile situation in *Cox v. Louisiana, supra*, in which 2000 Negro students demonstrated on the public street. The police testified that they feared violence might erupt in a "tense" situation from a "muttering," "grumbling," "jeering" crowd of 300 white onlookers. When the demonstrators refused to disperse on an order to do so, they were arrested and convicted. Noting that the demonstrators "themselves were not violent and threatened no violence. . . ." 379 U.S., at 550, and finding that the police "could have handled the crowd," *ibid.*, the Court reversed the convictions. The same result is compelled here, for the same reasons.²⁷

3. As we have pointed out above, the result is unaffected by the question whether the police might constitutionally have ordered petitioners to move along for the purpose of clearing passage on the sidewalk. Neither under Art. 27, § 123 nor under the police testimony was that the purpose of the order for disobedience of which the petitioners stand convicted. The order was made, and was required to be made under the statute, to prevent a breach of the peace. But so insubstantial was the threat of violence to which the police responded that a "breach of the peace" was either speculative, meaningless, or a euphemism for the crowd's annoyance at the anti-war protest.

²⁷ We note again the inapplicability of *Feiner v. New York, supra* note 30. In *Feiner*, there were only two policemen to deal with a crowd of seventy-five people that was "pushing, shoving and milling around" (340 U.S. at 317); at least one member of the crowd "threatened violence if the police did not act" (*ibid.*); and the speaker himself passed "the bounds of argument or persuasion and [undertook] . . . incitement to riot" (*id.*, at 321).

III

The Trial Court Committed Constitutional Error in Refusing Petitioners' Requested Instructions.

1. We have submitted in Part II(A) *supra* that petitioners' convictions must be reversed because the record compels the conclusion that the only "disturbance," "offense," or "resentment" occasioned by their conduct was the wholly ideological disturbance of a crowd of spectators who disagreed with, and were consequently angered by, petitioners' anti-war views. Whether or not the evidence as summarized in Part II(A) *compels* this conclusion, it assuredly *permits* it. On that evidence, the jury *could* have found only ideological disturbance even if (as we now assume *arguendo*) it could alternatively have found something else or more.

On this state of the record, petitioners were obviously entitled to an instruction that, if the jurors took a view of the facts under which there was no disturbance or offense save an ideological one, they should not be convicted. Such an instruction was indispensable if the case was not to go to the jury on an unconstitutional theory, since ideological disturbance or offense could plainly be understood to be included in the court's broad general definition of disorderly conduct as "the doing or saying or both of that which offends, disturbs, incites or tends to incite a number of people gathered in the same area" or "conduct of such nature as to affect the peace and quiet of persons who may witness it and who may be disturbed or provoked to resentment because of it." (A. 155 [Tr. 375-376].)

Petitioners submitted several requested instructions, set out verbatim at pp. 8-10, *supra*, designed to limit this general definition of disorderly conduct consistently with the First Amendment. It would unduly extend this brief to repeat them here. Requested Instructions V and VI state the law of the Constitution as expounded in *Edwards v. South Carolina*, 372 U.S. 229 (1963), and *Cox v. Louisiana*, 379 U.S. 536 (1965). They are proper statements of the law, applicable to the facts, and necessary qualifications of any theory of criminal liability that purports to permit conviction for disturbing or offending others.

Requested Instruction VII is taken almost word for word from the opinion in *Terminiello v. City of Chicago*, 337 U.S. 1, 45 (1949). It is taken, in particular, from that passage of the opinion which explains the deficiencies of the jury charge actually given in *Terminiello*. Since the general charge in petitioners' case was almost identical to the *Terminiello* charge, Requested Instruction VII obviously was both proper and necessary.

Failure to give these instructions was palpable constitutional error.

2. So, also, was the failure to give Requested Instructions I through IV or IV-A (A. 12-14). These would have limited the disobeying-a-police-order theory of the trial court's charge—i.e., "A refusal to obey a policeman's command to move on when not to do so may endanger the public peace, may amount to disorderly conduct" (A. 155-156 [Tr. 376])—consistently with *Cox v. Louisiana*, *supra*, and *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965). Without these limitations, the charge as given was

clearly overbroad under the holdings of these cases. Therefore, the Requested Instructions were constitutionally required.

Conclusion

Petitioners' convictions should be reversed.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1969

No. 729

DONALD BACHELLAR, ET AL.,
Petitioners,

v.

STATE OF MARYLAND,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF SPECIAL
APPEALS OF MARYLAND

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the Court of Special Appeals of Maryland (A. 171-181) entered on April 15, 1968, is reported in 3 Md. App. 626, 240 A. 2d 623. The Order of the Court of Appeals of Maryland denying certiorari to review the judgment of the Court of Special Appeals was rendered without an Opinion. It is unreported (A. 182).

JURISDICTION

The jurisdictional requisites are adequately set forth in Petitioners' brief.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Amendment I to the Constitution of the United States of America:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the Government for a redress of grievances."

2. Amendment XIV to the Constitution of the United States of America, Section 1:

"All persons born or naturalized in the United States and subject to the Jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. The italicized portion of Article 27, § 123 of the Annotated Code of Maryland (1967 Replacement Volume):

"Every person who shall be found drunk, or acting in a disorderly manner to the disturbance of the public peace, upon any public street or highway, in any city, town or county in this State, or at any place of public worship or public resort or amusement in any city, town or county of this State, or in any store during business hours, or in any elevator, lobby or corridor of any office building or apartment house having more than three separate dwelling units in any city, town or county of this State, and any person who drinks, or has in his possession, any intoxicating beverages while in attendance as a spectator or otherwise, at any place where an elementary school, junior high school or high school athletic contest is taking place, shall be deemed guilty of a misdemeanor; and upon conviction thereof

shall be subject to a fine of not more than fifty dollars, or be confined in jail for a period of not more than sixty days or be both fined and imprisoned in the discretion of the court. Habitual offenders may be fined not more than one hundred dollars or committed to jail or the Maryland House of Correction for not more than six months. An habitual offender is a person who shall have been convicted under the provisions of this section five (5) times in the preceding twelve (12) months. The trial magistrates of the respective counties of this State shall have concurrent jurisdiction over such offense with the Circuit Court for their respective counties." (Emphasis supplied.)¹

QUESTIONS PRESENTED

1. Petitioners, after being ejected from an Army Recruiting Office at the close of business hours where they were performing a sit-in, remained lying or sitting on a public sidewalk. A sidewalk blockage resulted and when petitioners refused several police requests to move, they were arrested. Petitioners were convicted of violating a Maryland statute which prohibited "acting in a disorderly manner to the disturbance of the public peace." This statute has been interpreted to mean (1) "doing or saying, or both, of that which offends, disturbs, incites, or tends to incite a number of people gathered in the same area," or (2) refusing "to obey a policeman's command to move on when not to do so may endanger the public peace." Is this statute as construed by the highest court of Maryland, unconstitutional?

2. For a period of two hours a detail of Baltimore City Police officers permitted 35-40 peaceful Anti-Vietnam

¹ The statute is quoted as it read on the date of this offense March 28, 1966. Maryland Laws of 1968, Chapter 146, § 3, eliminated drunkenness as a crime in Maryland, and Chapter 666, § 1 enumerated in subsections the several disorderly conduct offenses, retaining instant proscription in subsection (c).

demonstrators to picket outside an Army Recruiting Office, located on an important traffic artery (U.S. Route 111, State Route 146) in a commercial section of the City of Baltimore, and protected them from unsympathetic spectators. At the 5 P.M. closing time, the six petitioners, who had been staging a "sit-in" inside the Army Recruiting Office, refused to leave and had to be physically removed by United States Marshals and police from the office to the sidewalk. Petitioners assumed sitting or prone positions on the 10-12-foot sidewalk and effectively blocked its passage to pedestrians and pickets, causing the picketing to cease and pedestrian traffic to back up and spill out onto the roadway of the traffic artery. Petitioners refused repeated requests by officers to move and were then arrested. On this record, could there be any basis for the contention that the disorderly conduct statute was applied to petitioners in violation of the First and Fourteenth Amendments?

3. Petitioners, relying on *Terminiello v. Chicago*, 337 U.S. 1, 93 L. ed. 1131, 69 S. Ct. 894 (1949), sought to have the trial court instruct the jury that petitioners could not be convicted of disorderly conduct solely because their political views and ideas induced a condition of unrest, dispute or anger in other people. The trial court refused this request for instructions, giving instead as advisory instructions, the accepted Maryland law regarding disorderly conduct. Did the trial court commit constitutional error in its charge to the jury?

STATEMENT OF THE CASE

Anti-Vietnam Demonstration at the United States Army Recruiting Office, 3328 Greenmount Avenue, Baltimore, Maryland, March 28, 1966, from 3 P.M. to 5 P.M. (including picketing, distribution of literature, the crowd reaction

and police activity). The conduct of Petitioners including sitting in at the Recruiting Office, their expulsion from the Recruiting Office, their blockage of the sidewalk and refusal to move and their arrest.

Between 3 P.M. and 5 P.M. on March 28, 1966, a group of 30-40 persons demonstrated in a peaceful and orderly fashion on the sidewalk outside an Army Recruiting Office at 3328 Greenmount Avenue in Baltimore (A. 22, 37, 51, 80, 125). The demonstrators carried signs protesting the United States involvement in the Vietnam War (A. 37, 51, 79, 165, 167, 169), and some of the marchers distributed leaflets to people walking by (A. 50, 126). A detail of Baltimore police including an inspector, captain, lieutenant, sergeant and nine policemen from the Northern District plus additional officers from the Northeastern District, Traffic Division, an emergency car (Cruising Patrol No. 11), were at or near the scene (A. 37, 49). Photographs taken by Police Crime Laboratory representatives depict the orderly demonstration, the area of the 10-12 foot sidewalk utilized by the pickets, the signs displayed, the commercial neighborhood which was the site of the demonstration, and the police protection afforded picketers (A. 39, 45, 90, 163-170).

With the exception of an arrest of a bystander made by police when eggs were thrown at the picketers, the prosecution and defense testimony disclosed that the demonstration was peaceful and orderly (A. 50). The police were there to protect the picketers-demonstrators, which included women, children and one small child in a stroller (A. 53, 79).

The Petitioners arrived outside the Recruiting Office approximately 3 P.M., at which time they joined the picketers marching on the sidewalk (A. 80, 102). Some 15

minutes later the six Petitioners left the picket line, entered the Recruiting Office, and with David Harding acting as spokesman, engaged the Recruiting Officer, Sergeant Grumley, in conversation and requested that Anti-Vietnam posters be displayed in the front window of the Recruiting Office (A. 22, 81, 102). The Recruiting Officer declined this request, informed Petitioners that his function was to furnish information to individuals seeking to enlist in the Army and requested Petitioners to leave. Petitioners refused and stated that they would remain within the office until the posters were displayed (A. 23, 102). Exhibit 7 depicts one poster offered by Petitioners (A. 168).

When the Recruiting Officer refused Petitioners' request, they sat on the couch and chairs in the office without interference from the office personnel. At 5 P.M., the normal closing time, the Recruiting Officer turned off the lights, lowered the shades on the front window and again asked Petitioners to leave, however they again refused to move (A. 23, 82). United States Marshal Udoff had been present at the Recruiting Office for two hours on instructions from the United States Attorney for the District of Maryland, showed Petitioners his identification and several times asked the Petitioners to leave but they refused (A. 25, 82). The Marshal informed Petitioners he was going to request the assistance of police in removing Petitioners from the office but Petitioners made no attempt to move (A. 26, 102). The Marshal, a Deputy Marshal and police testified Petitioners were escorted (A. 26, 32), picked up bodily (A. 28, 153), carried out (A. 37, 47, 76, 82, 102, 108), forced out (A. 29), walked to the door (A. 33) and deposited on the sidewalk. The testimony varied as to whether they were deposited in a standing, sitting or prone position.

Sergeant DiCarlo testified that after two Petitioners were placed on the sidewalk they tried "to crawl back in, in between the door and the door jam so the door couldn't be closed" (A. 38). The Sergeant identified the six Petitioners, stated that the large crowd that had been witnessing this demonstration started to gather around them when Petitioners remained on the sidewalk in a sitting position. A large crowd gathered, the Petitioners "were blocking free passage of the sidewalk" (A. 39), "the crowd started to get hostile" (A. 39), and on three occasions Sergeant DiCarlo asked Petitioners to get up and leave (A. 38, 39). Petitioners did not respond to the Sergeant, gave no indication that they would get up and Lieutenant DiPino, who was present at the scene, also asked them to get up and leave. Shouts of "Let us get to them, we'll take care of them" were heard from the crowd (A. 39). Two United States Marines among the on-lookers had to be held by the officers. These Marines and also Navy personnel who were present had to be sent across the street by the police away from the Petitioners (A. 39). The officer, referring to the crowd, testified: "It did start to get a little wild" (A. 39).

On the third occasion when Petitioners were requested to move and refused, they were told, "Gentlemen, if you don't get up and leave we're going to have to arrest you" (A. 69). The Petitioners had to be carried from the sidewalk to the patrol wagon after they were placed under arrest (A. 69).

Both Sergeant DiCarlo and Lieutenant DiPino were standing alongside Petitioners when they asked them to move (A. 72), and if the Petitioners had gotten up the law enforcement officers would have escorted them to their cars as was done to some of the other picketers (A.

74). Sergeant DiCarlo denied that any law enforcement officials were holding Petitioners while they were sitting in a circle (A. 76), as alleged by Petitioners Harding (A. 83) and Rudman (A. 103). Petitioners David Harding and Daniel Rudman denied hearing the officers tell them to get up (A. 83, 104), but admitted singing and noise could have prevented these requests being heard (A. 97). Testimony on this point was not elicited from Petitioner Wayne Heimbach (A. 152, 153).

Lieutenant DiPino testified that he was present when the Petitioners refused the United States Marshal's request to leave the Recruiting Office at 5 P.M., and assisted in removing the last of the six to the sidewalk (A. 44) where "he was put on his feet and he just laid down" (A. 47). He confirmed Sergeant DiCarlo's testimony relating to the temper of the crowd of on-lookers, the blockage of the entire sidewalk and the protection afforded Petitioners by police (A. 45), the refusal of Petitioners to move (A. 63), the inability of pickets to continue their demonstration although they tried to picket but could not (A. 63). This officer related that one of the demonstrators was marching with "a couple of babies" which necessitated assigning an officer to insure the children did not get hurt (A. 63).

He estimated the crowd at 50-150, about 35 being picketers, spectators were saying, "Bomb Hanoi", approximately 8-10 law enforcement officers were on the sidewalk "trying to protect them so no one would come in on them" (A. 46, 61). The Petitioners refused to move, they started to sing (A. 45), the crowd was angry, one man said "Let me get to them, I'll bust him in the mouth" (A. 48). He heard Sergeant DiCarlo ask the Petitioners to move (A. 48), and he, Lieutenant DiPino, twice asked

Petitioners to move (A. 45) and said "If you don't get up you're under arrest" (A. 55). There was no possibility that the Petitioners did not hear him (A. 55), Petitioners "had ample time to get up. I gave them plenty of time to get up" (A. 56). The second time he told them to get up "I seen there could be violence" (A. 59). The picketers could not march because the six Petitioners did not get up (A. 57). "I asked them to get up and move. We didn't want to lock them up, we wanted them to get away, to clear the streets so people could walk. I asked them again. I said to my officers, 'Don't touch them, don't put a hand on them. If the wagon comes, they still refuse to move, we'll have to go'. In fact they wouldn't get up, we had to carry each one separately" (A. 59).

The testimony that Petitioners were arrested "to protect them from being hurt" was elicited during cross-examination of Lieutenant DiPino and his full answer at this point was: "Well, your Honor, from what I seen and I seen these men laying on the sidewalk where nobody could go through them, other people are moving in to do bodily harm, in my opinion it was disorderly conduct. We gave them ample time to move, to clear the sidewalk. They obstructed practically the length of the sidewalk from the recruiting office to the gutter and there is no one could get through. In fact, like I said before, when I seen the crowd closing in I arrested them also to protect them from being hurt" (A. 60).

There is a lack of consistency as to how long Petitioners remained in a sitting or prone position on the sidewalk. Estimates from law enforcement officers, witnesses, and Petitioners ranged from several minutes by Sergeant DiCarlo (A. 70, 71) to 15 minutes by the newspaper reporter Fogarty (A. 149). Police testified that Petitioners were requested on four occasions to get up and move (A.

69, 73). Petitioners and defense witnesses denied hearing these requests (A. 83, 96, 104, 115, 122, 126, 132), although they admitted that the singing and noise could have prevented these requests being heard (A. 97, 127, 129). Petitioners Harding and Rudman alleged they were "pushed down" when they attempted to rise from the sidewalk (A. 83, 92, 103), although Petitioner Harding admitted he did not see who placed a hand on his shoulder when he was in a sitting position and it could have been "one of my own pickets" (A. 93). Neither Harding nor Rudman saw any other petitioners restrained from being able to get up off the sidewalk (A. 94, 110), and Harding did not know why they didn't get up (A. 94). The newspaper reporter, a rebuttal witness, saw police talking to and making motions to at least two of the Petitioners but could not hear conversation because of the crowd noise (A. 144).

Officers of the Baltimore Police Department Crime Laboratory took pictures of the demonstration as it progressed (A. 39). These photographs were introduced as exhibits by the prosecution to show the peaceful picketing, the sidewalk blockage and the crowd spilling onto Greemount Avenue, a prominent traffic artery in the City of Baltimore, after ejection of Petitioners from the Recruiting Office and their blockage of the sidewalk (A. 163-170).

Testimony from prosecution and defense witnesses established that freedom to picket and distribute leaflets was not impaired throughout the entire demonstration (A. 48, 120, 125, 130, 138).

The State's case consisted of evidence presented by the Army Sergeant assigned to the Recruiting Office, the United States Marshal and a Deputy, and two officers of the Baltimore City Police Department. The defense presented testimony from two defendants and five picketers, all of

whom were friends of the defendants (A. 115, 125, 130, 133). The State's rebuttal consisted of testimony from one newspaper reporter present at the scene, and in surrebuttal one additional defendant testified.

History of the Proceedings

On April 19, 1966, the six Petitioners were found guilty in the Municipal Court of Baltimore City, Criminal Division, of disorderly conduct under Maryland Code, Article 27, § 123, (1967 Replacement Volume). Each Petitioner was sentenced to a term of sixty (60) days and a fine of Fifty Dollars (\$50.00) and costs (A. 5). On April 19, 1966, an appeal to the Criminal Court of Baltimore City was entered (A. 7).

After the Motion to Dismiss on the basis of a violation of First and Fourteenth Amendment rights was denied on June 8, 1966, a trial *de novo* before a jury followed and a guilty verdict resulted (A. 7, 8 and 159). At the conclusion of the State's case, Petitioners' Motion for Judgment of Acquittal, or for Dismissal on the Evidence, on the basis of insufficiency of the evidence and abridgment of First and Fourteenth Amendment Rights was denied (A. 9-11, 80). This motion was renewed and denied at the close of all the evidence (A. 153).

Petitioners submitted written Requests for Instructions I through VIII (A. 12-17). Instruction I asked that the jury be informed that Petitioners could not be convicted of disorderly conduct unless "they refused to obey a reasonable and lawful police order, clearly communicated to them". Instruction II asked that the jury be informed that such a police order is reasonable and lawful only if it is made to prevent an imminent public disturbance and if it is reasonably necessary in order to prevent such a disturbance. In-

struction III defined a "public disturbance" as physical violence or the attempt to use physical violence by one person against another, not simply anger or hostility or an episode of shouting, singing or name-calling not calculated to spill over into imminent violence. Instruction IV specified that the Petitioners could not be ordered to move on if they were doing only what they had a right to do even though this may anger or irritate others, and if a citizen was doing only those things a policeman could not order him to stop doing them merely because these things angered others and made others want to resort to violence. This instruction stated, "In such a case it is the obligation of the police to protect the citizen from violence by others, and they may not tell him to stop doing what he is doing, or to move along or go away merely because of threats of violence by others." If the Court ruled that Instruction IV was not proper, then IV-A was offered and provided that even if Petitioners refused to obey a proper police order, they could not be convicted if they were doing only what they had a right to do unless "the police reasonably believe that it is impossible to prevent violence from occurring by restraining only those persons who are threatening violence". Alternative Instruction I-A was offered in the event Instruction I was not considered proper. Alternative Instruction I-A requested that the jury be informed that Petitioners could not be convicted unless they "(1) refused to obey a reasonable and lawful police order, clearly communicated to them; or (2) knowingly and purposely engaged in acts which they had no lawful right to do, and which were calculated and likely in themselves to lead to an imminent public disturbance; or (3) knowingly and purposely engaged in acts which they had no lawful right to do, and which obstructed or hindered pedestrians or traffic." Instructions V, VI and VII all requested that the jury be charged con-

cerning the Petitioners' expression of views or ideas. Specifically, Instruction V would prohibit conviction if the only conduct likely to cause a public disturbance "was the expression of views or ideas which other people did not like or resented, or which stirred other people to anger or violence".

Instruction V reads:

"Under no circumstances may you convict these defendants if the only conduct of theirs which was likely to lead to an imminent public disturbance was the expression of views or ideas which other people did not like or resented, or which stirred other people to anger or violence. The defendants may be convicted only if their conduct, or their manner of expressing their ideas was offensive and likely to lead to a public disturbance, and not if it was the ideas themselves that they were expressing or supporting, which were likely to create a public disturbance. Where conduct — in this case the physical acts of the defendants — is likely to lead to imminent public disturbance, the police may order it stopped, and the refusal to obey such an order is disorderly conduct. But where the danger of imminent public disturbance created by an individual arises from the ideas or the views or beliefs which he expresses, he may not be required to stop and is not guilty of disorderly conduct for refusing to obey a police order to stop expressing his views."

Instruction VI reads:

"Specifically, I charge you that if the only threat of public disturbance arising from the actions of these defendants was a threat that arose from the anger of others who were made angry by their disagreement with the defendants' expressed views concerning Viet Nam, or American involvement in Viet Nam, you must acquit these defendants. And if you have a reasonable doubt whether the anger of those other per-

sons was occasioned by their disagreement with defendants' views on Viet Nam, rather than by the conduct of the defendants in sitting or staying on the street, you must acquit these defendants."

Instruction VII reads:

"The defendants at all times had a legally protected right to set forth their political views, beliefs or ideology even if the result was to induce a condition of unrest, create dissatisfaction in others, invite dispute, or even stir people to anger at their views. If they did nothing more to create a public disturbance than to exercise this right, the police could not lawfully order them to move along or go away, and they are not guilty of disorderly conduct for disobeying such a police order."

Instruction VIII was to the effect that petitioners would be guilty if they were obstructing the passage of pedestrians on the sidewalk, or if police or a crowd who were attracted by these petitioners sitting on the sidewalk or lying on the sidewalk were obstructing the passage of pedestrians.

Petitioners' request for jury instruction was refused, instead, the Court's instructions in pertinent part, were:

"As all or most of you at least know under the constitution and laws of the State of Maryland the jury in the trial of a criminal case is the judge of both the law and the facts. Anything the Court may say to you about the law is purely advisory. It is intended to be of some help to you but you are at liberty to reject the Court's advise on the law, to arrive at your own independent conclusions of the law if you decide to do so. Likewise, if I should make any comment on the facts, you are not bound by such comment in any respect. It is your function to pass upon the truth of the testimony as given by the various witnesses and the weight to be given their testimony. However,

it is the duty of the Court in a criminal case to advise the jury on the law whenever such a request is made by counsel for either the State or the Defense. There has been such request in this case.

Now there will be no indictment or other papers to be taken with you to the jury room. I simply invite your attention to the fact that each of the six defendants on trial before you today is charged with the crime known as disorderly conduct. Therefor it becomes necessary that I advise you as to what is meant by disorderly conduct.

At common law there was no offense known by that term. In more recent times, however, the charge is contained in a statute known as Section 123 of Article 27 of the Maryland Annotated Code. The essential parts of this statute I will now read to you.

‘Every person who shall be found acting in a disorderly manner to the disturbance of the public peace upon any public street or highway in any city, town or county in this state shall be deemed guilty of a misdemeanor’.

That misdemeanor is known as disorderly conduct. In further amplification of the meaning of the charge, I instruct you that disorderly conduct is the doing or saying or both of that which offends, disturbs, incites or tends to incite a number of people gathered in the same area. It is conduct of such nature as to affect the peace and quiet of persons who may witness it and who may be disturbed or provoked to resentment because of it. A refusal to obey a policeman’s command to move on when not to do so may endanger the public peace, may amount to disorderly conduct.”

Petitioners took exception to the definition of disorderly conduct, as offered by the Trial Judge to the jury, on the basis that their First and Fourteenth Amendment rights were violated due to vagueness (A. 159). A guilty verdict was returned and a sentence of sixty (60) days and a fine of Fifty Dollars (\$50.00) was imposed on each Petitioner

(A. 159-161). An appeal to the Court of Special Appeals by Petitioners raised seven (7) allegations of error, three (3) of which are the subject of this Petition, namely:

1. That Article 27, Section 123, is unconstitutional on its face under the First and Fourteenth Amendments to the Constitution of the United States;

2. That Article 27, Section 123, as applied from this record, was an unconstitutional abridgment of Petitioners' right of free speech, expression, petition and assembly guaranteed by the First and Fourteenth Amendments to the Constitution of the United States;

3. That Petitioners' convictions violate the First and Fourteenth Amendments to the Constitution of the United States because the Trial Court refused to instruct the jury that Petitioners had a constitutional right to express their political beliefs and ideas, and the jury could not convict solely because those ideas induced a condition of unrest, dispute or anger in other people.

On April 15, 1968, the Court of Special Appeals affirmed the Petitioners' convictions and by Order dated November 26, 1968, the Court of Appeals denied Certiorari (A. 171-182). A Petition for a Writ of Certiorari was filed in this Court on February 15, 1969 and granted October 13, 1969 (A. 183).

SUMMARY OF ARGUMENT

I. The arrest and prosecution of Petitioners was based on their disorderly conduct which caused a disturbance of the public peace on a street in the City of Baltimore. Petitioners were a portion of a group demonstrating against United States policy in Vietnam, however their political views and ideas did not cause their arrest and prosecution. This position is established by the recognition that the

remaining 35-40 demonstrators, whose activities were peaceful, were not arrested but, on the contrary, received police protection and were granted complete freedom to picket an Army Recruiting Office and distribute literature to unsympathetic on-lookers. Only when Petitioners sat and/or lay on a 10-12 foot sidewalk, in a commercial section of the city, blocked it as a public passageway, and refused officers' requests to move, were they arrested for disorderly conduct. The thrust of Petitioners' argument is that their arrest and prosecution was based on an expression of their political views and ideas. The Respondent argues that Petitioners' arrests, prosecution and convictions were based solely on their disorderly conduct and the vehicle used for this prosecution, Article 27, § 123 of the Maryland Code, the Disorderly Conduct Statute, was a valid constitutional instrument.

II. The Maryland Disorderly Conduct Statute as interpreted by the courts makes its prohibitions sufficiently clear so that a man of common intelligence would be able to know when his conduct would violate the statute. The Maryland Court of Appeals has interpreted this statute as: "The doing or saying, or both, of that which offends, disturbs, incites, or tends to incite a number of people gathered in the same area . . . also, it has been held that failure to obey a policeman's command to move on when not to do so may endanger the public peace, amounts to disorderly conduct." *Drews v. State*, 224 Md. 186 (1961). *Drews* on two occasions was considered by this court (*Drews v. Maryland*, 378 U.S. 547, 12 L. ed. 2d 1032, 84 S. Ct. 1900 (1964) and 381 U.S. 421, 14 L. ed. 2d 693, 85 S. Ct. 1576 (1965)) and in neither instance was the statute voided for vagueness or overbreadth.

The Court of Special Appeals of Maryland reached the conclusion that the Petitioners fully blocked the 10-12-foot

sidewalk for pickets and pedestrians and the resulting arrest of Petitioners on a disorderly conduct charge arose directly "out of the obstruction of the sidewalk which consequentially was causing a public disturbance and the specific refusal to comply with three lawful commands of the police officers." *Bacheller v. State*, 3 Md. App. 626 at 631, 240 A. 2d 623 (1968). And at page 634 the Court stated:

"Applying the common sense doctrine, we find that the instant statute in conjunction with the previous judicial constructions cited was sufficiently definite to inform a man of ordinary intelligence of the nature of activity proscribed."

Similar disorderly conduct statutes have been held constitutional in *Feiner v. New York*, 340 U.S. 315, 95 L. ed. 295, 71 S. Ct. 303 (1951), and *Chaplinsky v. New Hampshire*, 315 U.S. 568, 86 L. ed. 1031, 62 S. Ct. 766 (1942).

III. Petitioners were prosecuted because their acts constituted disorderly conduct within the prohibition of Article 27, § 123, not because their ideas and opinions created a public disturbance. Their rights of free speech, petition and assembly guaranteed by the First and Fourteenth Amendments were not abridged.

Evidence produced at the trial disclosed that police permitted picketing for two hours by 35-40 demonstrators outside an Army Recruiting Office, and the United States Marshal permitted Petitioners to stage a "sit-in" inside an Army Recruiting Office for a similar period. At closing time when Petitioners refused to leave the office they had to be physically removed from the building. After two Petitioners tried unsuccessfully to crawl back into the building, Petitioners staged a "sit-down" on the public sidewalk effectively blocking passage to the picketers and pedestrians. The crowd of 50-150 persons were unable to

use the sidewalk and spilled onto the street which was a prominent traffic artery in Baltimore. Petitioners thereupon refused to comply with the repeated requests of the officers to move and were arrested for disorderly conduct. None of the peaceful picketers were arrested, however police made one arrest of a bystander for throwing eggs at the picketers.

This evidence shows that the Disorderly Conduct Statute was applied to Petitioners because of their disorderly acts, not their views or ideas.

IV. The charge to the jury by the trial judge was proper under the Maryland law and no constitutional error existed in this charge. The trial judge clearly stated that his comments were purely advisory, and Petitioners' counsel was permitted under Maryland law to argue the facts and law to the jury, even if contrary to the advisory instructions given by the trial judge.

The instructions as given were fair, proper and amply covered the Requested Instructions I through IV-A and VIII. Instructions V through VII were based on the "expression of views or ideas" theory which was unsupported by the evidence and therefore properly refused.

ARGUMENT

I.

INTRODUCTION

Petitioners' argument throughout this litigation has sought to establish that this case involves the issue of free speech — the freedom of expression of political ideas. The position of the State of Maryland has consistently been that the Petitioners were tried and convicted for their *conduct* which was *disorderly*. No attempt was ever made by Maryland law enforcement officers or its courts to curtail Peti-

tioners' First or Fourteenth Amendment rights, as a matter of fact these rights were vigorously protected. However, the State owed another duty to the public, including the pickets, namely not to sit idly by and permit Petitioners' conduct to disrupt the order of the community, block the city sidewalks and thus prevent their use by pedestrians and pickets, or permit requests from law enforcement officers to be ignored when it was apparent that by refusing to comply with these requests the peace and safety of the public was in imminent peril.

The entire thrust of Respondent's argument will, therefore, be anchored firmly on the actual *conduct* of the Petitioners, the constitutionality of the Maryland Disorderly Conduct Statute as interpreted by the Maryland courts and as applied to Petitioners at their trial, and the instructions to the jury.

The fact that the *ideas* of Petitioners were shared by the 35-40 picketers, and Maryland law enforcement authorities granted these picketers complete freedom during the two-hour demonstration is indicative that freedom of speech rights were not violated. An analysis of the *conduct* of Petitioners, as distinguished from that of the pickets, will most convincingly compel the conclusion that Petitioners' conduct was indeed disorderly. Their conduct included an undisputed and prolonged trespass in the Recruiting Office, defiance of federal officials, a blockage of a city sidewalk in a commercial area at 5 P.M. causing a horde of persons to be crammed into a small area. The refusal of Petitioners to respond to a proper request to move, so as to unplug the congestion their immobile bodies were causing, and thus enable the pedestrians and pickets to resume their unobstructed use of the sidewalk cannot be ignored by the State.

Indeed, to have ignored this responsibility would have constituted a failure by the State of a duty owed to the

peaceful pickets and pedestrians. In none of the cases before this Court has there ever been a suggestion that this power of the State should not be utilized. "When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the state to prevent or punish is obvious", *Cantwell v. Connecticut*, 310 U.S. 296, 308, 84 L. ed. 1213, 60 S. Ct. 900 (1940). "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend. The control of travel on the streets of cities is the most familiar illustration of this recognition of social need. Where a restriction of the use of highways in that relation is designed to promote the public convenience in the interest of all, it cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection", *Cox v. New Hampshire*, 312 U.S. 569, 85 L. ed. 1049, 61 S. Ct. 762 (1941), at 574. "Governmental authorities have the duty and responsibility to keep their streets open and available for movement. A group of demonstrators could not insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations", "Nothing we have said here or in No. 24, 379 U.S. 536, 13 L. ed. 2d 471, 85 S. Ct. 453, is to be interpreted as sanctioning riotous conduct in any form or demonstrations, however peaceful their conduct or commendable their motives, which con-

flict with properly drawn statutes and ordinances designed to promote law and order, protect the community against disorder, regulate traffic, safeguard legitimate interests in private and public property, or protect the administration of justice and other essential governmental functions", "The First and Fourteenth Amendments, I think, take away from government, state and federal, all power to restrict freedom of speech, press, and assembly *where people have a right to be for such purposes*. This does not mean, however, that these amendments also grant a constitutional right to engage in the conduct of picketing or patrolling, whether on publicly owned streets or on privately owned property. See *Labor Board v. Fruit & Vegetable Packers & Warehousemen*, 377 U.S. 58, 76, 12 L. ed. 129, 141, 84 S. Ct. 1063 (concurring opinion). Were the law otherwise, people on the streets, in their homes and anywhere else could be compelled to listen against their will to speakers they did not want to hear. Picketing, though it may be utilized to communicate ideas, is not speech, and therefore is not of itself protected by the First Amendment", "And the crowds that press in the streets for noble goals today can be supplanted tomorrow by street mobs pressuring the courts for precisely opposite ends", *Cox v. Louisiana*, 379 U.S. 536, 13 L. ed. 2d 471, 85 S. Ct. 453 (1965). "The police power of a municipality is certainly ample to deal with all traffic conditions on the streets — pedestrian as well as vehicular. So there could be no doubt that if petitioner were one member of a group obstructing a sidewalk he could, pursuant to a narrowly drawn ordinance, be asked to move on and, if he refused, be arrested for the obstruction.", *Shuttlesworth v. Birmingham*, 382 U.S. 87, 15 L. ed. 2d 176, 86 S. Ct. 211 (1965). "Disturbers of the peace do not always rattle swords or shout invectives. It is high time to challenge the assumption in which too many people have

too long acquiesced, that groups that think they have been mistreated or that have actually been mistreated have a constitutional right to use the public's streets, buildings, and property to protest whatever, wherever, whenever they want, without regard to whom such conduct may disturb", *Brown v. Louisiana*, 383 U.S. 131, 162, 15 L. ed. 2d 637, 86 S. Ct. 719 (1966). And the singing by the Petitioners and pickets may have, according to Petitioners, prevented the requests of the officers to move from being heard. This misplaced vocalizing may have been visualized by Mr. Justice Black in his concurring opinion in *Brown, supra*, at p. 168: "The peaceful songs of love can become as stirring and provocative as the Marseillaise did in the days when a noble revolution gave way to rule by successive mobs until chaos set in".

The tool utilized by the State of Maryland, Article 27, § 123, the Disorderly Conduct Statute, was a proper one. The Statute was drawn and has been interpreted along narrow, specific lines that are understandable to the common man. It gives fair warning of what is prohibited. The intelligence and breadth of knowledge of the Petitioners, college students or graduates, would appear to present no problem to their clearly understanding its prohibitions. To the contrary, their conduct and actions were not only in opposition of the Statute but in defiance of governmental authority and disregard for the safety of their fellow citizens. This Statute was fairly, reasonably and non-discriminatorily applied to the Petitioners and the instructions given by the *nisi prius* judge to the jury were proper. "A State or its instrumentality may, of course, regulate the use of its libraries or other public facilities. But it must do so in a reasonable and nondiscriminatory manner, equally applicable to all and administered with equality to all", *Brown v. Louisiana, supra*, at p. 143.

II.

THE MARYLAND DISORDERLY CONDUCT STATUTE, ARTICLE 27, SECTION 123 OF THE ANNOTATED CODE OF MARYLAND, IS A CONSTITUTIONAL LEGISLATIVE ENACTMENT. AS INTERPRETED AND APPLIED BY THE COURT OF APPEALS OF MARYLAND, IT IS NEITHER VOID FOR VAGUENESS NOR OVERBREADTH.

This issue is a basic one. Does the Maryland disorderly conduct statute as interpreted by its courts make its prohibitions sufficiently clear so that a person of common intelligence would be able to know when their conduct would violate the statute?

"We agree to all the generalities about not supplying criminal laws with what they omit, but there is no canon against using common sense in construing laws as saying what they obviously mean." Words used by Mr. Justice Holmes in *Roschen v. Ward*, 279 U.S. 337 at 339, 73 L. Ed. 722, 49 S. Ct. 336 (1929).

The Maryland disorderly conduct statute obviously intends to proscribe disorderly conduct. It reads in pertinent part:

"Every person who shall be found . . . acting in a disorderly manner to the disturbance of the public peace, upon any public street or highway, in any city, town or county in this State . . . shall be deemed guilty of a misdemeanor; and upon conviction thereof, shall be subject to a fine of not more than fifty dollars, or be confined in jail for a period of not more than sixty days or be both fined and imprisoned in the discretion of the court. . . ."

Maintaining the public peace is the primary responsibility of the State, not the Federal Government. The states have enacted statutes to meet this responsibility and have provisions in their constitutions guaranteeing freedom of

religion, speech, press and peaceful assembly. Before these treasured principles were included in the Federal Constitution, they existed in Maryland. The disorderly conduct statute has existed in Maryland since 1719 and in the form which is now being questioned since 1880. Its constitutionality as to form and manner of application has merited the approval of the Maryland judiciary. This Court considered a previous constitutional challenge of this statute, *Drews v. Maryland*, 378 U.S. 547 (1964), and reversed and remanded on other grounds. The case was affirmed on remand in *Drews v. State*, 236 Md. 349 (1964) and the appeal was dismissed and certiorari denied in *Drews v. Maryland*, 381 U.S. 421 (1965).

The author of an effective yet constitutionally appropriate disorderly conduct statute must be possessed of many talents. Precision, good judgment, political acumen, reasonableness, intuition, clairvoyance, soothsaying, not to mention a knowledge of constitutional law, must be attributes of the author. This exercise in talents is the responsibility of the State legislatures, not this Court. After the legislature has adopted the disorderly conduct statute, its "on the spot" implementation by the State's officer must pass the leisurely scrutiny of the State and Federal courts. In drafting such a disorderly conduct statute it is literally impossible to articulate with the utmost specificity all of the precise activities which are proscribed.

"The draftsman thus must maintain proper balance between the specifications of acts sufficient to enlighten judges and administrators and flexible directions which permits adjustment and effective enforcement of the statute. . . . Simplicity of expression, however, need not lead to uncertainty if generic terms are selected for de-

scriptive purposes. In fact, in most cases questions of interpretation will be fewer if the statute is general in character than if it is burdened with excessive details. Nevertheless such drafting may lead to constitutional attack for the many decisions on the question of uncertainty have encouraged litigants to allege the unconstitutionality of statutes on this ground.

"It is the duty of courts however to endeavor by every rule of construction to ascertain the meaning of and give full force and effect to the legislative product unless it violates a specific constitutional prohibition. . . . An analysis of the decided cases indicates that determinations of invalidity based on uncertainty frequently reflect antagonism to legislative policy rather than uncertainty concerning legislative meaning." See Sutherland Statutory Construction, 3rd Edition Horack, § 4920.²

The lack of specificity in a rule, law or commandment does not render it impotent when the exercise of logic and common sense permit an understanding of its prohibitions to a person of average intelligence. An examination of the laws given to Moses on Mount Sinai centuries ago would enable argument to be advanced that these laws are void for vagueness or overbreadth. The Maker, In-

² *Winters v. New York*, 333 U.S. 507, 92 L. Ed. 840, 68 Sup. Ct. 665 (1948) (statutory vagueness and free speech); Comment, The Void for Vagueness Rule in California, 41 Calif. L. Rev. 525 (1953); Notes, 61 Harv. L. Rev. 1208 (1948); 23 Ind. L.J. 272 (1948); 22 So. Calif. L. Rev. 298 (1949); "A statute cannot be held void for uncertainty if any reasonable and practical construction can be given to its language." . . . ("a statute is not required to have that degree of exactness which inheres in a mathematical theorem"); *State v. Hertzog*, 241 La. 783, 131 So. 2d 788 (1961) (even though the word "vulgar" would have been void for vagueness standing alone, it was sufficiently definite by virtue of its association with the words "obscene, profane, . . . lewd, lascivious or indecent" to save a statute restricting anonymous telephone calls of that description from invalidity); . . .

terpreter and Final Arbiter of these laws has apparently in the interim not deemed their amendment to be necessary. Although noncompliance with their admonitions and prohibitions has been prevalent, it seems obvious that noncompliance has been due as in Petitioners' case, to the intent of the violator, rather than lack of understanding of the commandments.

Simple generic terms as used in the statute express to a man of average intelligence what is necessary or prohibited. The commandments are expressed in the simplest of terms and completely understandable to the sinner, although theologians may experience difficulty in agreeing on an interpretation. The standards "hot" and "cold" present no problem to the child seeking a drink but would be totally unacceptable to a meteorologist to permit a description of the weather or a scientist performing an experiment. The "Disorderly Conduct" prohibition is similarly clearly understood by its offenders and the man of common intelligence, however judges and lawyers might well contest its specific meaning as they have been doing for centuries over the terms "probable cause", "due process", "reasonable", "competent", "fair", "proper", etc.

Common terms used in a statute are to be given their common meaning. "Legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him." Justice Frankfurter in *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 618, 88 L. Ed. 1488, 1496, 64 Sup. Ct. 1215, 1221 (1944); *Palmer v. Spaulding*, 299 N.Y. 368, 87 N.E. 2d 301 (1949) (where ordinary meaning was ascribed the word "ad-dicted"); "Laws are enacted to be read and observed by

the people and in order to reach a reasonable and sensible construction thereof, words that are in common use among the people should be given the same meaning in the statute as they have among the great mass of the people who are expected to obey and uphold them."

Some courts have gone so far as to say that it is unconstitutional for a legislature to give words in a statute anything other than their common meanings. *Central Television Service, Inc. v. Isaacs*, 27 Ill. 2d 420, 189 N.E. 2d 333 (1963).

Complexity of social problems with which a statute deals is a reason for adopting a "practical construction" of the statutory language, lest legislative "purposes be too easily nullified by over-refined inquiries into the meaning of words." *People v. Fair*, 62 Cal. Rptr. 632 (Cal. App. 1967).

The Court of Special Appeals of Maryland in deciding this case, *Bacheller v. State*, *supra*, at 631 stated:

"All statutes come before this Court cloaked in a presumption of constitutionality. Therefore, any challenge levied at the constitutionality of a duly enacted statute must clearly establish that said statute plainly contravenes the Federal or State Constitutions, otherwise the presumption remains un rebutted and the statute will not be declared unconstitutional. See *Woodell v. State*, 2 Md. App. 433, 437, 234 A. 2d 890 (1967). Clearly, a statute is within the guidelines of the constitutional safeguards only if persons of ordinary intelligence would be able to know when their conduct would place them in violation of the specified statutory prohibition. *Connally v. General Construction Co.*, 269 U.S. 384, 46 S. Ct. 126, 70 L. Ed. 322 (1926); *Lanzetta v. New Jersey*, 306 U.S. 451, 59 S. Ct. 618, 83 L. Ed. 888 (1939). However, while compelling strict compliance to such guidelines, the Federal Constitution refrains from the imposition of impossible standards of specificity in the construction of penal

statutes. The primary requirement is that a statute convey 'sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice.' *United States v. Petrillo*, 332 U.S. 1, 8, 67 S. Ct. 1538, 91 L. Ed. 1877 (1947); *United States v. Woodward*, 376 F. 2d 136, 140 (1967).

"The formulation of statutory language is, at best, an inexact exercise vulnerable to varying degrees of doubt and ambiguity. Therefore, the enunciation of the meaning and ambit of a specific statute by judicial construction strives to ascertain and define the legislative intent and purpose, and upon making of a determination of the legislative meaning the efficacy of the statute is more clearly and precisely promulgated.

"In making our determination of the instant statute's constitutional posture, we remain attentive to the observation of Mr. Justice Holmes in *Roschen v. Ward*, 279 U.S. 337, 49 S. Ct. 336, 73 L. Ed. 722 (1929), when he stated at page 339:

"We agree to all the generalities about not supplying criminal laws with what they omit, but there is no canon against using common sense in construing laws as saying what they obviously mean.'"

Although reversing on other grounds, this Court in *Shuttlesworth v. Birmingham*, *supra*, ruled that in passing on the constitutionality of an ordinance the Supreme Court has the duty to accept the State judicial construction of an ordinance. The judicial construction placed upon Article 27, Section 123 by the Maryland Court is:

"The gist of the crime of disorderly conduct under Sec. 123 of Art. 27, as it was in the cases of common law predecessor crimes, is the doing or saying, or both, of that which offends, disturbs, incites, or tends to incite a number of people gathered in the same area. . . . Also, it has been held that failure to obey a policeman's command to move on when not to do so may endanger the public peace, amounts to disorderly conduct." *Drews v. State*, 224 Md. 186.

Similar disorderly conduct statutes have been held constitutional in *Feiner v. New York*, *supra*, and *Chaplinsky v. New Hampshire*, *supra*.

The Court of Special Appeals of Maryland reached the conclusion that the Petitioners fully blocked the 10-12 foot sidewalk for pickets and pedestrians and the resulting arrest of Petitioners on a disorderly conduct charge arose directly "out of the obstruction of the sidewalk which consequentially was causing a public disturbance and the specific refusal to comply with three lawful commands of the police officers." *Bacheller v. State*, *supra*, at 631. In affirming the convictions the Court stated at page 634:

"Applying the common sense doctrine, we find that the instant statute in conjunction with the previous judicial constructions cited was sufficiently definite to inform a man of ordinary intelligence of the nature of activity proscribed. Faced with the present facts and circumstances, it would unduly stretch our credulity to accept the urging that the appellants, after obstructing the sidewalk by sitting and lying down thereon, and refusing to comply with the thrice repeated request by the police, were ignorant of the fact that they were engaged in disorderly conduct of such a nature as legally proscribed."

In *Thompson v. Louisville*, 362 U.S. 199, 4 L. ed. 2d 654, 80 S. Ct. 624 (1960) at 205, this Court had before it a conviction on a disorderly conduct ordinance (which was reversed on other grounds) of the City of Louisville, Kentucky. The ordinance read: "Whoever shall be found guilty of disorderly conduct in the City of Louisville shall be fined". The court made no reference in its opinion to vagueness or overbreadth in the wording of this ordinance.

This Court has held that a statute is not unconscionably vague where its provisions employ words with a well

settled common law meaning, *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 53 L. ed. 417, 29 S. Ct. 220 (1909); *Nash v. United States*, 229 U.S. 373, 57 L. ed. 1232, 33 S. Ct. 373 (1913); *Hygrade Provision Co. v. Sherman*, 266 U.S. 497, 69 L. ed. 402, 45 S. Ct. 141 (1925), approved in *Connally v. General Construction Co.*, 269 U.S. 385, 70 L. ed. 322, 46 S. Ct. 126 (1926), or is not couched in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. *Whitney v. California*, 274 U.S. 357, 71 L. ed. 1095, 28 S. Ct. 641 (1927); *Fox v. Washington*, 236 U.S. 273, 59 L. ed. 73, 35 S. Ct. 383 (1915); *Miller v. Strahl*, 239 U.S. 426, 60 L. ed. 364, 36 S. Ct. 147 (1915); *Omaechevarria v. Idaho*, 246 U.S. 343, 62 L. ed. 763, 38 S. Ct. 323 (1918); *United States v. Alford*, 274 U.S. 264, 71 L. ed. 1040, 47 S. Ct. 597 (1927), and this expression of view is not limited to cases of recent vintage as Chief Justice Marshall, in *United States v. Wiltberger*, 5 Wheat. 76, 95, 48 Harvard Law Review 751, stated:

" . . . though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. . . . The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction."

In *United States v. Woodard*, 376 F. 2d 136 (1967), the defendants were convicted in the United States District Court for the Northern District of Illinois, Eastern Division, of disorderly conduct pursuant to Assimilated Crimes Act and Illinois Disorderly Conduct Statute. On Appeal the United States Court of Appeals for the Seventh Circuit held that the First Amendment did not protect the conduct of one defendant who announced to marshals at a House Committee on Unamerican Activities hearing that if de-

fendant was going to leave the marshals would have to carry him and then fell limp on the floor, causing disorder and confusion among others nearby, or conduct of his co-defendant who shouted while present at the hearing and who refused to stop shouting after warning.

The Illinois Statute under which they were charged provided "a person commits disorderly conduct when he knowingly . . . does any act in such unreasonable manner as to alarm or disturb another and to provoke a breach of the peace." No judicial interpretation of this section of the Illinois Code was made available to the Seventh Circuit Court of Appeals, however the following legislative committee comments afforded some assistance in the construction of the statute.

"Section 26 — 1(a) is a general provision intended to encompass all of the usual types of 'disorderly conduct' and 'disturbing the peace'. Activity of this sort is so varied and contingent upon surrounding circumstances as to almost defy definition. Some of the general classes of conduct which have traditionally been regarded as disorderly are here listed as examples: the creation or maintenance of loud and raucous noises of all sorts; unseemly, boisterous, or foolish behavior induced by drunkenness; threatening damage to property or indirectly threatening bodily harm (which may not amount to assault); carelessly or recklessly displaying firearms or other dangerous instruments; preparation for engaging in violence or fighting; and fighting of all sorts. In addition, the task of defining disorderly conduct is further complicated by the fact that the type of conduct alone is not determinative, but rather culpability is equally dependent upon the surrounding circumstances. Thus, the discharge of a pistol on the desert by a lone marksman is harmless, whereas the discharge of the same pistol in a library or church is blameworthy. Similarly, shouting, waving and drinking beer may be

permissible at the ball park, but not at a funeral. These considerations have led the Committee to abandon any attempt to enumerate 'types' of disorderly conduct. Instead, another approach has been taken. As defined by the Code, the gist of the offense is not so much that certain overt type of behavior was accomplished, as it is that the offender knowingly engaged in some activity in an unreasonable manner which he knew or should have known would tend to disturb, alarm or provoke others. The emphasis is on the unreasonableness of his conduct and its tendency to disturb. The Committee felt that this definition places the offense on its proper foundation, namely, an invasion of the right of others not to be molested or harassed, either mentally or physically, without justification."

In a separate concurring opinion written by Judge Cummings:

"It is of course a court's duty to strive for a construction of a statute that will support its constitutionality. *Screws v. United States*, 325 U.S. 91, 98, 100, 65 S. Ct. 1031, 89 L. Ed. 1495; *United States v. National Dairy Corp.*, 372 U.S. 29, 32, 83 S. Ct. 594, 9 L. Ed. 2d 561, Amsterdam, 'The Void-for-Vagueness Doctrine in the Supreme Court', 109 U. of Pa. L. Rev. 67, 86 (1960)."

* * * * *

"As Professor Paul Freund has pointed out, even an over-broad statute can be saved by construction relatively simple and natural

"Because of the 'hard core' nature of these violations, it is clear that defendants had notice that their activities were within the ambit of the Illinois statute and therefore cannot successfully assail its purported vagueness. . . . Clearer methods of achieving the ends sought by this statute would not be feasible, for, as the draftsman recognized, disorderly conduct activity defies precise statutory definition. . . . It would be manifestly unfair to invalidate a new statute, expertly

drawn to cope with elusive subject matter, if the statute can be saved by judicious construction. . . .

"In considering the New Jersey disorderly conduct statute, that State's Supreme Court recognized that 'the subject is such that greater specificity is not feasible', thus requiring the courts to see to it that the statute is 'not applied beyond a fair understanding of the legislative intent'. *State v. Smith*, 46 N.J. 510, 218 A. 2d 147, 152 (1966), certiorari denied, 385 U.S. 838, 87 S. Ct. 85. Here a man of ordinary intelligence would certainly know what kind of behavior comports with an orderly legislative hearing. This standard suffices to justify the application of the Illinois statute to the facts of this case. *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322."

As recently as 1968 in *Zwicker v. Boll*, 391 U.S. 353, 20 L. Ed. 2d 642, 88 S. Ct. 1666 (1968), this Court in a per curiam opinion affirmed the judgment of a three-judge district court ruling which dismissed the federal complaint without an evidentiary hearing in favor of state criminal proceedings. The relief sought by petitioners was a declaratory judgment that the Wisconsin disorderly conduct statute was overboard and void, or an injunction restraining state criminal prosecution against them under that statute. The statute in question was Wisconsin Statute 947.01 which reads in pertinent part:

"947.01. Disorderly conduct. Whoever does any of the following may be fined not more than \$100 or imprisoned not more than 30 days: (1) In a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud, or otherwise disorderly conduct under circumstances in which such conduct tends to cause or provoke a disturbance. . . ."

In regulating public conduct, the basic aims of all legislatures are the same, and the wording of all disorderly

conduct statutes are similar; however, the Maryland disorderly conduct statute, Article 27, Section 123, *supra*, is clearly not as broad as that of many states.³

*Disturbing the Public Theory and
Disobeying Police Theory.*

The argument advanced by Petitioners to support each of these theories is met and defeated by *Feiner v. New York*, *supra*. In *Feiner* this court upheld the conviction for violation of Section 722 of the Penal Law of New York.⁴ In *Feiner* the police officers made no effort to interfere with the speech just as Baltimore officers made no effort to interfere with the peaceful picketing. The concern of police was aroused, however, in *Feiner* with the effect of the crowd on both pedestrian and vehicular traffic. As in the present case the Baltimore officers were similarly concerned with the inability of pedestrians and pickets to use the sidewalk. The crowds in both instances were restless, and as *Feiner's* statements "stirred up a little excitement", it is a fair statement to say that Petitioners conduct not their ideas, had a similar reaction. On three occasions the

³ A review of the Disorderly Conduct or Disturbing the Peace Statutes of other states indicates that the Maryland Statute as judicially interpreted possesses greater clarity, specificity and reasonableness than many states. For a comparison of the Maryland Statute with those of other jurisdictions plus American Law Institute, Model Penal Code Statutes relating to "Disorderly Conduct", "Obstructing Highways and other Public Passages", and "Riot: Failure to Disperse", see Footnote 3A which, due to length, is set forth at Pages 55 through 69 of this brief.

⁴ Section 722:

"Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned commits any of the following acts shall be deemed to have committed the offense of disorderly conduct: 1. Uses offensive, disorderly, threatening, abusive or insulting language, conduct or behavior; 2. Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others; 3. Congregates with others on a public street and refuses to move on when ordered by the police; . . ."

Syracuse, New York, police requested *Feiner* to cease and desist and upon his refusal he was arrested. The case presently under consideration bears a remarkable similarity.

The Maryland Court of Special Appeals stated "applying the common sense doctrine, we find that the instant statute in conjunction with the previous judicial constructions cited was sufficiently definite to inform a man of ordinary intelligence of the nature of activity proscribed. Faced with the present facts and circumstances, it would unduly stretch our credulity to accept the urging that the appellants, after obstructing the sidewalk by sitting and lying down thereon, and refusing to comply with the thrice repeated request by the police, were ignorant of the fact that they were engaged in disorderly conduct of such a nature as legally proscribed." *Bacheller v. State, supra*, at 634 and p. 30, *supra*.

The Petitioners are college students or graduates and there is no indication that they possessed less than ordinary intelligence.

The New York statute which was upheld in *Feiner* would merit from Petitioner the same charges that he levels at the Maryland Disorderly Conduct Statute. The New York Statute is considerably broader than the Maryland Statute in that it condemns offensive language which results in a breach of the peace. The New York statute includes "refuses to move on when ordered by police" which has been judicially added to the Maryland Statute.

In upholding Petitioners' convictions the Maryland Court of Special Appeals commented:

"It is of considerable significance that the prior constitutional challenge levied upon this specific statute and section in *Drews v. State, supra*, 224 Md. 186, reversed and remanded on other grounds in *Drews v. Maryland*, 378 U.S. 547 (1964) was affirmed on remand in *Drews v. State*, 236 Md. 349, 204 A. 2d 64 (1964)

and the appeal was dismissed and certiorari denied in *Drews v. Maryland*, 381 U.S. 421 (1965). This in conjunction with the fact that similar disorderly conduct statutes have been held constitutional by the United States Supreme Court in *Feiner v. New York*, 340 U.S. 315, 71 S. Ct. 303, 95 L. Ed. 267 (1951), and *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S. Ct. 766, 86 L. Ed. 1034 (1942) leads us to conclude that statutes of this kind are not repugnant to the Federal Constitution." (A. 176-177).

It is submitted that Article 27, § 123 of the Maryland Code does not offend the basic principle that a statute is bad if it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application," *Connally v. General Construction Co.*, *supra*. The Maryland Statute proscribes "acting in a disorderly manner" and although the judicial construction includes the "doing or saying, or both" the facts in this case relate only to Petitioners' conduct not their ideas or speech.

III.

PETITIONERS WERE ARRESTED BECAUSE THEIR ACTS CONSTITUTED DISORDERLY CONDUCT WITHIN THE PROHIBITIONS OF ARTICLE 27, SECTION 123, NOT BECAUSE THEIR IDEAS AND OPINIONS WERE DEEMED TO CREATE A PUBLIC DISTURBANCE; THUS THE RIGHTS OF FREE SPEECH, PETITION AND ASSEMBLY GUARANTEED BY THE FIRST AND FOURTEENTH AMENDMENTS WERE NOT ABRIDGED.

A distinction must be made at this juncture, between a theoretical discussion of the constitutional right of a group of persons to espouse ideas and views that may merit public approbation or distain, and, a practical consideration of the actual facts that are now before this Court, namely Petitioners disorderly conduct March 28, 1966, on a busy Baltimore sidewalk. No legal stratagem can deny: that

Baltimore Police were present in sufficient numbers to insure that the activities of anti-war picketers were fully protected for a two hour period; that peace and order was successfully maintained by police during this demonstration; that this tranquility was abruptly terminated when the six petitioners assumed a sitting or prone position on a 10'-12-foot wide sidewalk; that a blockage in pedestrian and picket traffic resulted; that petitioners refused repeated police requests to get up and move; that their arrest was reluctantly made by police, because of their disorderly conduct, to restore order in the community.

Testimony from the arresting officers clearly establishes that the arrests were made because Petitioners "were blocking free passage of the sidewalk" (A. 39). Lieutenant DiPino testified:

"I asked them to get up and move. We didn't want to lock them up, we wanted them to get away, to clear the streets so people could walk. I asked them again. I said to my officers, 'Don't touch them, don't put a hand on them. If the wagon comes, they still refuse to move, we'll have to go'. In fact they wouldn't get up, we had to carry each one separately" (A. 59).

Petitioners would have this Court adopt the theory that they were arrested because the ideas they espoused made the crowd "hostile". Testimony would indicate that this was an existing circumstance at the time but *not* the reason Petitioners were arrested. Petitioners' argument cannot prevail. It was not accepted by the Maryland courts and Lieutenant DiPino's statement,

"When I asked them to get up they wouldn't get up. They got up in a sitting position. I asked them twice. They started to sing. Then they started to sing. I said 'Wait' to the men 'wait until the wagon comes'. I said 'If you don't get up you're under arrest'. They wouldn't get up; they were under arrest" (A. 55).

can permit no conclusion other than the Petitioners were arrested for blocking the sidewalk, and for failure to obey a policeman's command to move on when not to do so may endanger the public peace.

At p. 53 of Petitioners' brief it is stated:

"We have also said at pp. 27-29, *supra*, that we do not challenge or deny Maryland's power to keep its sidewalks unobstructed, as well as peaceful. *But the power against obstruction has nothing to do with this case.*" (Emphasis supplied).

This is the key issue in this matter. An examination of the record clearly discloses that *obstruction of the sidewalk* was the prevailing factor that caused the arrest of Petitioners, not disagreement with their ideas. For example, the record shows:

1. That police permitted picketing for two hours and the United States Marshal permitted a sit-in in an Army Recruiting Office for a similar period. These conditions would permit a reasonable conclusion to be drawn that neither the state nor federal officials acted in a precipitous fashion and deprived Petitioners of First and Fourteenth Amendment rights.

2. At the end of the two hour period the removal of Petitioners from the Recruiting Office was essential as the office was closing.

3. The removal was accomplished in the only manner possible, namely by physically carrying or escorting Petitioners outside the building.

4. After an unsuccessful attempt by two of the Petitioners to crawl back into the office (A. 38), the "sit-in" of Petitioners was converted into a "sit-down" on a public sidewalk.

5. That an ample supply of officers were present to insure that peace and order existed and pedestrian and vehicular traffic was not impeded throughout the peaceful picketing and distribution of handbills (A. 37, 49, 65, 165-167, 169).

6. That the peace and order which prevailed during the demonstration was markedly, if not violently, disturbed by the concerted conduct of Petitioners in remaining in a prone or sitting position on the 10'-12' sidewalk, effectively blocking it as a public passageway.

7. That this sidewalk was in a commercial section, the 5 P.M.-5:15 P.M. sidewalk sit down prevented the peaceful picketers from continuing to march, and caused pedestrian traffic, amounting to 50-150 persons, to become blocked because no one could pass through the Petitioners.

8. That this sidewalk blockage resulted in pedestrian traffic spilling out onto the roadway of Greenmount Avenue, which is a prominent traffic artery in the City of Baltimore (A. 170).

9. That Petitioners, during the existence of this sidewalk blockage, refused to comply with the repeated requests of the officers to move.

10. Rather than suppressing expression protected by the First Amendment, this right was permitted and guarded by Baltimore law enforcement officers for a period of two hours. Only when the disorderly Petitioners effectively blocked the sidewalk, prevented pedestrians and demonstrators from freely participating in legitimate movement, and ignored the repeated legitimate requests by police to move, did so-

ciety's representatives exercise their dual responsibility and duty by removing the disorderly Petitioners from the chaotic condition that existed and placing them under arrest.

Photographic evidence introduced by the State clearly shows that the sidewalk was completely blocked and the crowd spilled out onto the traffic artery (A. 170). This contradicts testimony from petitioner Daniel Rudman who testified:

"Was it possible for people to walk through you when you were on the sidewalk? A. Yes, sir. As I stated previously there was plenty of space for people to walk through" (A. 113).

As law enforcement officers, the Baltimore police on the scene had the responsibility of preserving the public peace. The public peace was definitely disturbed; the circumstances disclosed that peace and order could only be restored by having the Petitioners get up and move. Since Petitioners refused to move, and our laws do not permit either fellow citizens or law officers to use force under these conditions, the officers had no choice other than to exercise their arrest powers in order to:

- a. Remove Petitioners physically from the sidewalk, and
- b. Thus permit the free use of the sidewalk by pedestrians to restore public peace and order.

Misdemeanors amounting to a breach of the peace had been committed in the presence of law enforcement officers and citizens, therefore the arrest could have been made by either. Obstructing the sidewalk had the legal effect under these circumstances of not only constituting a violation of Article 27, § 123, the Disorderly Conduct Stat-

ute, but also Article 27, § 121 of the Maryland Code, obstructing free passage.⁵ There can be no doubt of a violation of the Disorderly Conduct Statute as certainly Petitioners' actions in refusing to comply with the repeated requests by police escalated their offense into the category of disorderly conduct, if in fact it could be said that Petitioners combined action in blocking the sidewalk was not in itself disorderly conduct. The fact that the prosecutor elected to proceed under the Disorderly Conduct Statute (Article 27, § 123) rather than the obstructing the sidewalk section (Article 27, § 121) was entirely within the prerogative of the prosecutor when a violation of both statutes existed.

Petitioners cite language used by Lieutenant DiPino and Sergeant DiCarlo in testifying at the trial, to support argument that the arrest was due to the hostility of spectators; that officers felt compelled to "lock them up for their protection" (A. 65, Pet. Br. 50). The language used by officers is not the determining factor, but rather the facts and circumstances existing at the scene determine the applicable law.

"To make constitutional questions turn on the term chosen by police officers to describe their activity — officers who are accustomed to the vernacular of the police station and unschooled in the accepted constitutional vocabulary — is to engage in a futile and un-

⁵ "Article 27.

§ 121. Obstructing free passage; making unseemly noises; obscene language, etc.

Any person who shall wilfully obstruct or hinder the free passage of persons passing along or by any public street or highway in any city, town or county of this State, . . . shall, upon conviction thereof, be sentenced to a fine of not less than one dollar and not more than twenty-five dollars and costs of the prosecution . . ."

This statute was amended effective June 1, 1966, so that the penalty was increased to a maximum fine of one hundred dollars and imprisonment for a period of not more than thirty days.

warranted exercise in semantics." *Ralph v. Peper-sack*, 335 F. 2d 128 at 134 (1964).

In upholding an arrest for "Investigation" a federal court of appeals said:

"Of course there is no such crime as 'Investigation.' But this description given by the officer does not go to the question of probable cause. The question is not what name the officer attached to his action; it is whether, in the situation in which he found himself, he had reasonable ground to believe a felony had been committed and that the men in the car had committed it." *Bell v. United States*, 254 F. 2d 82 (1958).

A statement Lord Mansfield made in 1779 that in trying the legality of acts of officers "They ought not to suffer from a slip of form, if their intention appears by evidence to have been upright . . . The principal inquiry to be made by a court of justice is how the heart stood? And if there appears to be nothing wrong there, great latitude will be allowed for misapprehension or mistakes". *United States v. Bell*, 48 F. Supp. 986 at 992 (1943).

In addition to the factors cited, *supra*, the upright intentions of the Baltimore Police Department are marked by three additional incidents:

1. The laws of the State of Maryland were fairly enforced throughout the demonstration as noted by the arrest of one person in the crowd for throwing eggs at the picketers (A. 50).

2. The police were assigned to the area of the demonstration for the purpose of protecting the demonstrators and preserving rather than interfering with their First and Fourteenth Amendment rights (A. 44, 53).

3. Photographs of the scene were taken in order to preserve for later judicial scrutiny the actual conditions which existed (A. 39). This action conformed with a technique suggested by this Court 77 days later in *Miranda v. Arizona*, 384 U.S. 436 at 467, 477, 16 L. ed. 2d 694, 86 S. Ct. 1602 (1966).

Decisions of this Court fully support the action taken by the law enforcement officers of Maryland in arresting Petitioners.

The language in *Cantwell v. Connecticut*, *supra*; *Cox v. New Hampshire*, 312 U.S. 569, 85 L. Ed. 1049, 61 S. Ct. 762 (1941); *Cox v. Louisiana*, 379 U.S. 536, 13 L. Ed. 2d 471, 85 S. Ct. 453 (1965), and *Cox v. Louisiana*, 379 U.S. 559, 13 L. Ed. 2d 487, 85 S. Ct. 476 (1965); and *Shuttlesworth v. Birmingham*, 382 U.S. 87, 15 L. Ed. 2d 176, 86 S. Ct. 211 (1965) seem quite applicable.

Cantwell v. Connecticut, *supra*, at page 308 states:

"The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquillity. It includes not only violent acts but acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the state to prevent or punish is obvious."

Cox v. New Hampshire, *supra*, at page 574 states:

"Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would

be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather one of the means of safeguarding the good order upon which they ultimately depend. The control of travel on the streets of cities is the most familiar illustration of this recognition of social need. Where a restriction of the use of highways in that relation is designed to promote the public convenience in the interest of all, it cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection."

Cox v. Louisiana, supra, at pages 554-555 states:

"Governmental authorities have the duty and responsibility to keep their streets open and available for movement. A group of demonstrators could not insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations."

Cox v. Louisiana, supra, at page 574 states:

"Nothing we have said here or in No. 24, 379 U.S. 536, 13 L. Ed. 2d 471, 85 S. Ct. 453, is to be interpreted as sanctioning riotous conduct in any form or demonstrations, however peaceful their conduct or commendable their motives, which conflict with properly drawn statutes and ordinances designed to promote law and order, protect the community against disorder, regulate traffic, safeguard legitimate interests in private and public property, or protect the administration of justice and other essential governmental functions."

and at page 578 in a separate opinion by Mr. Justice Black:

"The First and Fourteenth Amendments, I think, take away from government, state and federal, all power

to restrict freedom of speech, press, and assembly where, people have a right to be for such purposes. This does not mean, however, that these amendments also grant a constitutional right to engage in the conduct of picketing or patrolling, whether on publically owned streets or on privately owned property. See *Labor Board v. Fruit & Vegetable Packers & Warehousemen*, 377 U.S. 58, 76, 12 L. Ed. 129, 141, 84 S. Ct. 1063 (concurring opinion). Were the law otherwise, people on the streets, in their homes and anywhere else could be compelled to listen against their will to speakers they did not want to hear. Picketing, though it may be utilized to communicate ideas, is not speech, and therefore is not of itself protected by the First Amendment. *Hughes v. Superior Court*, 339 U.S. 460, 464-466, 94 L. Ed. 985, 991, 992, 70 S. Ct. 718; *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 93 L. Ed. 834, 69 S. Ct. 684; *Bakery & Pastry Drivers & Helpers v. Wohl*, 315 U.S. 769, 775-777, 86 L. Ed. 1178, 1183, 1184, 62 S. Ct. 816 (Douglas, J., concurring)."

and at page 584:

"And the crowds that press in the streets for noble goals today can be supplanted tomorrow by street mobs pressuring the courts for precisely opposite ends."

Shuttleworth v. Birmingham, *supra*, at page 95, Mr. Justice Douglas concurring states:

"The police power of a municipality is certainly ample to deal with all traffic conditions on the streets — pedestrian as well as vehicular. So there could be no doubt that if petitioner were one member of a group obstructing a sidewalk he could, pursuant to a narrowly drawn ordinance, be asked to move on and, if he refused, be arrested for the obstruction."

The series of segregation cases cited by Petitioners where this Court reversed convictions, ruling that basically unfair arrests and prosecutions followed peaceful as-

semblies or other innocent activity as in *Edwards v. South Carolina*, 372 U.S. 229, 9 L. ed. 2d 697, 83 S. Ct. 680 (1963); *Wright v. Georgia*, 373 U.S. 284, 10 L. ed. 2d 349, 83 S. Ct. 1240 (1963); *Henry v. Rock Hill*, 376 U.S. 776, 12 L. ed. 79, 84 S. Ct. 1042 (1964); *Cox v. Louisiana*, 379 U.S. 536, 13 L. ed. 471, 85 S. Ct. 453 (1965); *Shuttlesworth v. Birmingham*, 382 U.S. 87, 15 L. ed. 2d 176, 86 S. Ct. 211 (1965), and *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969), are readily distinguishable. This case differs from the convictions that were reversed in *Cantwell v. Connecticut*, *supra*, and *Terminiello v. Chicago*, 337 U.S. 1, 93 L. ed. 1131, 69 S. Ct. 894 (1949) where pure speech was the issue.

Other than arresting Petitioners and restoring the sidewalk to its unobstructed use by pedestrians, what alternative was available to police? Should a detail of police be assigned to protect Petitioners until they decided to move? This would insure Petitioners' safety, but the sidewalk blockage would require detouring the pedestrians into the street or have them cross to use the sidewalk on the other side of the street. If detoured into the street, motorists would be impeded and an accident might result in personal injuries. If pedestrians crossed this commercial artery in the middle of the block to avoid the sidewalk blockage, the risk of injury to pedestrians is increased. If pedestrians were required by police to cross the street at the block intersections north and south of the blockage, police might be subjected to criticism for heavy-handedness and arbitrariness in so diverting the public. And what if a pedestrian refused to be so diverted, could he be arrested for disorderly conduct?

Additionally, preventing the use of the sidewalk by pedestrians for the purpose for which it was intended, while permitting Petitioners to use the sidewalk for a pur-

pose for which it was not intended could be construed as a violation of a pedestrian's constitutional right. If the detour was a prolonged one, due to the desire of Petitioners to remain on the sidewalk for an indefinite period, would Waverly Laundromat, Miller's Liquors, the grocery store, Bar-B-Q, beauty shop, Waldorf Tuxedos and the other merchants not identifiable in the photographs of the scene (A. 167, 169, 170) have a basis for suit against the government, by virtue of the same Fourteenth Amendment now being utilized by Petitioners, for depriving these merchants of property without due process of law as their business would be affected because customers would be unable to enter these premises? Surely our laws do not contemplate such conditions.

This is why statutes such as the one in issue were passed — to protect society from public misconduct, conduct that society regards as being offensive to order and decency. Irrespective of any commendable motives Petitioners may have had, their conduct was unjustified and illegal.

IV.

NO CONSTITUTIONAL ERROR EXISTED IN THE TRIAL COURT'S CHARGE TO THE JURY.

The State of Maryland is one of two states in which the jury by constitutional provision⁶ is judge of the law and the facts in criminal cases. This unique situation has been commented upon by this Court. *Brady v. Maryland*, 373

⁶ Article XV, § 5, Maryland Constitution:

"In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction."

Article I, § 19, Constitution of Indiana:

"In all criminal cases whatever, the jury shall have the right to determine the law and the facts."

U.S. 83, 10 L. ed. 2d 215, 83 S. Ct. 1194 (1963). The Maryland Rules of Procedure⁷ provide for the issuance of advisory instructions by the trial judge and Rule 756(b) specifies how the instructions are to be given:

"The court may and at the request of any party shall, give such advisory instructions to the jury as may correctly state the applicable law; the court may give its instructions either orally or in writing. The court need not grant any requested instruction if the matter is fairly covered by the instructions actually given. The court shall in every case in which instructions are given to the jury, instruct the jury that they are the judges of the law and that the court's instructions are advisory only."

Rule 756 (c) relates to any reference to evidence:

"In giving any advisory instructions under section b of this Rule, the court may make such summation of or reference to the evidence as may be appropriate in order to present clearly to the jury the issue to be decided by them; provided the court instructs the jury that they are the judges of the facts and that it is for them to determine the weight of the evidence and the credit to be given to the witnesses."

Maryland permits counsel to argue to the jury the facts and the law even if contrary to the advisory instructions given by the trial judge and where the trial judge refuses to permit counsel to argue the law and facts reversals have resulted, *Wilson v. State*, 239 Md. 245, 210 A. 2d 824 (1965). Nothing in the Maryland law or court decisions prevented Petitioners from arguing any question on the facts or law to the jury, and any instructions issued by the judge were advisory only.

⁷ Rule 756.

The Requested Instructions

Both Instruction I (A. 12) and alternate Instruction I-A (A. 15) purport to specify how the Disorderly Conduct Statute may be violated, however both are incomplete. Instruction I is limited to disobeying a lawful police order, and while I-A sets out three situations that would be in violation of the statute, it does not include all situations. The words of the *nisi prius* jurist properly instructed the jury (A. 154-158), and, the following specific language which the judge used indicated when the Maryland Disorderly Conduct Statute would be violated:

"In further amplification of the meaning of the charge, I instruct you that disorderly conduct is the doing or saying or both of that which offends, disturbs, incites or tends to incite a number of people gathered in the same area. It is conduct of such nature as to affect the peace and quiet of persons who may witness it and who may be disturbed or provoked to resentment because of it. A refusal to obey a policeman's command to move on when not to do so may endanger the public peace, *may* amount to disorderly conduct." (A. 155-156) (Emphasis supplied.)

Instruction II (A. 12) attempts to define a lawful order to "move along" only "if it is made to prevent an imminent public disturbance, and if it is reasonably necessary in order to prevent such a disturbance". This is covered by the language cited (re Instruction I and I-A) *supra*. Instruction III would have the jurist define to the jury "public disturbance" as "physical violence, or the attempt to use physical violence, by one person against another", and not merely "an episode of shouting or singing or name-calling not calculated to spill over into imminent violence". This definition is legally incomplete, and additionally, is covered by the language cited (re Instructions I and I-A) *supra*.

Instructions IV and IV-A (A. 13, 14) seek to refine the instances when the police might issue their request to "move on", however this aspect is also covered by the language cited (re Instructions I and I-A) *supra*.

Instructions V, VI, VII (A. 14, 15) are based on the "expression of views or ideas" theory which is totally unsupported by the evidence. The Maryland Court of Special Appeals in its opinion stated:

"The evidence before the trial court clearly established that the arrests and charges resulted from appellants' refusal to cease their obstruction of the sidewalk and resultant public disturbance and because they had refused to comply with three lawful commands of a police officer. We further note that the standing demonstrators were not arrested. Since the evidence adduced below rejected any substance to the allegation that the arrests were predicated upon suppression of political views, the instructions were properly rejected." (A. 180 and 3 Md. App. 626, 629, 340 A. 2d 623).

Instruction VIII (A. 16, 17) relates to several jury questions including whether Petitioners were permitted to rise by police. The judge's instructions included these comments:

"Now the defense in the case, as I understand it, is that the defendants take the position that they did not hear the command of the officers to get up and move along. If that is the case they had a right to sit on the sidewalk or in the case of one or two of them restrained there by the hand of the officer. That of course is for you to judge." (A. 157).

This point is apparently not pursued in this Petition.

It is submitted that a reading of the advisory instructions as given by the judge (A. 154-158 and pages 14, 15, *supra*) were fair, proper and amply covered the instruc-

tions requested by Petitioners in Requested Instructions I through IV-A, and VIII (A. 12-17). Petitioners' Requested Instructions V through VII (A. 14, 15) are all based on the "expression of views or ideas" theory which is unsupported by the evidence and were properly refused.

The fact that the six Petitioners were arrested and not the 35-40 peaceful demonstrators, is a salutary and explicit refutation of Petitioners' argument that the arrest was the result of an expression of their position on Vietnam. The testimony at the trial clearly established that the arrests arose directly, as stated by the Court of Special Appeals "out of the obstruction of the sidewalk which consequentially was causing a public disturbance and the specific refusal to comply with three lawful commands of the police officers (A. 174). This circumstance negated any inference that Petitioners' arrests were predicated upon a suppression of their political views. Petitioners' Requested Instructions V through VII were, therefore, inappropriate to this case and reliance on *Terminiello v. Chicago*, *supra*, was misplaced as *Terminiello* related to a freedom of speech situation. *Terminiello* was *speaking* in an "auditorium . . . filled to capacity with over eight hundred persons present. Others were turned away. Outside of the auditorium a crowd of about one thousand persons gathered to protest against the meeting. A cordon of policemen was assigned to the meeting to maintain order; but they were not able to prevent several disturbances. The crowd outside was angry and turbulent.

"Petitioner in his speech condemned the conduct of the crowd outside and vigorously, if not viciously, criticized various political and racial groups whose activities he denounced as inimical to the nation's welfare." *Terminiello v. Chicago*, *supra*, at p. 3. Requested Instructions V through

VII were appropriate in *Terminiello* but inappropriate in *Bacheller*.

Since the disorderly *actions* of the Petitioners caused the disturbance of the public peace and thus violated the Maryland Disorderly Conduct Statute, the Maryland trial judge's refusal to charge the jury as Petitioners requested was a proper exercise of judicial authority.

CONCLUSION

The Maryland Statute (Article 27, § 123) is written in clear, plain and understandable terms. It holds no hidden meaning and is not vague to a man of ordinary intelligence. The statute was constitutionally applied to Petitioners and contrary to the argument advanced by Petitioners, their convictions were based solely on their disorderly actions not their political beliefs or views on the Vietnam issue. The instructions given by the trial judge were proper and it is, therefore, respectfully requested that their convictions be affirmed.

Respectfully submitted,

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FOOTNOTE 3A TO PAGE 35.

DISORDERLY CONDUCT OR DISTURBING THE PEACE STATUTES OF OTHER STATES

Code of Alabama, Title 14, § 119(1):

"Any person who disturbs the peace of others by violent, profane, indecent, offensive or boisterous conduct or language or by conduct calculated to provoke a breach of the peace, shall be guilty of a misdemeanor, . . ."

Arizona Revised Statutes, Title 13, § 371:

"A person is guilty of a misdemeanor who maliciously and wilfully disturbs the peace or quiet of a neighborhood, family or person by:

1. Loud or unusual noise. 2. Tumultuous or offensive conduct. 3. Threatening, traducing, quarreling, challenging to fight or fighting. 4. Applying any violent, abusive or obscene epithets to another . . ."

Arkansas Statutes, Title 41, § 1432:

"Any person who shall enter any public place of business of any kind whatsoever, or upon the premises of such public place of business, or any other public place whatsoever, in the State of Arkansas, and while therein or thereon shall create a disturbance, or a breach of the peace, in any way whatsoever, including, but not restricted to, loud and offensive talk, the making of threats or attempting to intimidate or any other conduct which causes a disturbance or breach of the peace . . . shall be guilty . . ."

California Penal Code, Section 415:

"Every person who maliciously and willfully disturbs the peace or quiet of any neighborhood or person, by loud or unusual noise, or by tumultuous or offensive conduct, or threatening, traducing, quarreling, challenging to fight, or fighting, . . . or use any vulgar, profane, or indecent language within the presence or hearing of women or chil-

dren, in a loud and boisterous manner, is guilty of a misdemeanor, . . ."

Colorado Revised Statutes, Chapter 40, Article 8, § 1:

"If any person maliciously or willfully disturb the peace or quiet of any neighborhood or family, by loud or unusual noises, or by tumultuous or offensive carriage, threatening, traducing, quarreling, challenging to fight, or fighting . . ."

Connecticut General Statutes Annotated, Title 53, § 175:

"Any person who, by offensive or disorderly conduct, annoys or interferes with any person in any place . . . by any disorderly conduct, . . . shall be . . ."

Delaware Code Annotated, Title 11, Section 471:

"Whoever brawls, quarrels, uses abusive, obscene, threatening or profane language in a loud tone of voice, . . . is guilty of disorderly conduct and shall be . . ."

District of Columbia Code, Section 22-1121:

"Whoever, with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby — (1) Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others; (2) congregates with others on a public street and refuses to move on when ordered by the police; (3) shouts or makes a noise either outside or inside a building during the nighttime to the annoyance or disturbance of any considerable number of persons; . . . shall be . . ." (this Section was held not to be unconstitutionally vague in *Jalbert v. District of Columbia*, 221 A. 2d 94. Although reversed on other grounds the U. S. Court of Appeals, District of Columbia Circuit, found it unnecessary to reach the vagueness issue. 387 F. 2d 233 and *Feeley v. District of Columbia*, 387 F. 2d 216 (1967).

Florida Statutes Annotated, Title 44, Section 877.03:

"Whoever commits such acts as are of a nature to corrupt the public morals, or outrage the sense of public de-

gency, or affect the peace and quiet of persons who may witness them, or engages in brawling or fighting, or engages in such conduct as to constitute a breach of the peace or disorderly conduct, shall be guilty . . ."

Code of Georgia Annotated, Section 26-5501:

"All other offenses against the public peace, not herein provided for, shall be misdemeanors."

Hawaii Revised Statutes, Title 37, Section 772-2:

"Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:

- (1) Uses offensive, disorderly, threatening, abusive, or insulting language, conduct, or behavior;
- (2) Congregates with others on a public street or sidewalk and refuses to move on when ordered by the police;
- (3) By his actions causes a crowd to collect, except when lawfully addressing such a crowd;
- (4) Shouts or makes a noise either outside or inside a building during the nighttime to the annoyance or disturbance of any three or more persons. . . ."

Idaho Code, Title 18, Section 6409:

"Every person who maliciously and willfully disturbs the peace or quiet of any neighborhood, family or person, by loud or unusual noise, or by tumultuous or offensive conduct, or by threatening, traducing, quarreling, challenging to fight or fighting, . . . or uses any vulgar, profane or indecent language within the presence or hearing of women or children, in a loud and boisterous manner, is guilty of a misdemeanor."

Illinois Annotated Statutes, Chapter 38, Section 26-1

"(a) A person commits disorderly conduct when he knowingly:

- (1) Does any act in such unreasonable manner as to alarm or disturb another and to provoke a breach of the peace; or . . ." (see page 31, *supra* for discussion of *United States v. Woodard*, 376 F. 2d 136 (1967) where this statute held not unconstitutionally vague.)

Indiana Statutes Annotated, Title 10, Section 10-1510:

"Whoever shall act in a loud, boisterous or disorderly manner so as to disturb the peace and quiet of any neighborhood or family, by loud or unusual noise, or by tumultuous or offensive behavior, threatening, traducing, quarreling, challenging to fight or fighting, shall be deemed guilty of disorderly conduct, and upon conviction, . . ."

Iowa Code Annotated, Title 35, Section 744.1:

"If any person make or excite any disturbance in a tavern, store, or grocery, or at any election or public meeting, or other place where the citizens are peaceably and lawfully assembled, he shall be . . ."

Kansas Criminal Code, Section 21-4101:

"Disorderly conduct is, with knowledge or probable cause to believe that such acts will alarm, anger or disturb others or provoke an assault or other breach of the peace:

- (a) Engaging in brawling or fighting; or
- (b) Disturbing an assembly, meeting, or procession, not unlawful in its character; or
- (c) Using offensive, obscene, or abusive language or engaging in noisy conduct tending reasonably to arouse alarm, anger or resentment in others.

Disorderly conduct is a class C misdemeanor."

Kentucky Revised Statutes, Chapter 437.016:

"(1) A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:

- (a) Engages in fighting or in violent, tumultuous or threatening behavior; or
- (b) Makes unreasonable noise; or
- (c) In a public place uses abusive or obscene language, or makes an obscene gesture; or
- (d) Without lawful authority, disturbs any lawful assembly or meeting of persons; or
- (e) Obstructs vehicular or pedestrian traffic; or
- (f) Congregates with other persons in a public place and refuses to comply with a lawful order of the police to disburse; or
- (g) Creates a hazardous or physically offensive condition by any act that serves no legitimate purpose."

Louisiana Revised Statutes, Title 14, Section 103:

"Disturbing the Peace. Disturbing the peace is the doing of any of the following in such a manner as would foreseeably disturb or alarm the public: (1) Engaging in a fistic encounter; or (2) using of any unnecessarily loud, offensive, or insulting language; or (3) appearing in an intoxicated condition; or (4) engaging in any act in a violent and tumultuous manner by any three or more persons; or (5) holding of an unlawful assembly; or (6) interruption of any lawful assembly of people; or (7) commission of any other act in such a manner as to unreasonably disturb or alarm the public."

Maine Revised Statutes, Title 17, Section 3953:

"Any person who shall by any offensive or disorderly conduct, act or language annoy or interfere with any per-

son in any place or with the passengers of any public conveyance, although such conduct, act or language may not amount to an assault or battery, is guilty of a breach of the peace and shall be . . ."

Annotated Laws of Massachusetts, Chapter 272, Section 53:

"Stubborn children, runaways, common night walkers, both male and female, common railers and brawlers, persons who with offensive and disorderly act or language accost or annoy persons of the opposite sex, lewd, wanton and lascivious persons in speech or behavior, idle and disorderly persons, prostitutes, disturbers of the peace, keepers of noisy and disorderly houses and persons guilty of indecent exposure may be punished by . . ."

Michigan Compiled Laws Annotated, Chapter 28, Section 750.167:

"Any person of sufficient ability, who shall . . . be . . . engaged in any indecent or obscene conduct in any public place; . . . any person who shall be found jostling or roughly crowding people unnecessarily in a public place; . . . shall be deemed a disorderly person . . ."

Minnesota Statutes Annotated, Chapter 609, Section 609.72:

"Whoever does any of the following in a public or private place, knowing, or having reasonable grounds to know that it will, or will tend to, alarm, anger or disturb others or provoke an assault or breach of the peace, is guilty of disorderly conduct and may be sentenced to imprisonment for not more than 90 days or to payment of a fine of not more than \$100:

- (1) Engages in brawling or fighting; or
- (2) Disturbs an assembly or meeting, not unlawful in its character; or
- (3) Engages in offensive, obscene, or abusive language or in boisterous and noisy conduct tending reasonably to arouse alarm, anger, or resentment in others."

Mississippi Code Annotated, Title 11, Section 2090.5:

"Any person who shall enter any public place of business of any kind whatsoever, or upon the premises of such public place of business, or any other public place whatsoever, in the State of Mississippi, and while therein or thereon shall create a disturbance, or a breach of the peace, in any way whatsoever, including, but not restricted to, loud and offensive talk, the making of threats or attempting to intimidate, or any other conduct which causes a disturbance or breach of the peace or threatened breach of the peace, shall be guilty of . . ."

Missouri Statutes, Title 38, Section 562.240:

"If any person or persons shall willfully disturb the peace of any neighborhood, or of any family, or of any person, by loud and unusual noise or by offensive or indecent conversation, or by threatening, quarreling, challenging or fighting, every person so offending shall, upon conviction, . . ."

Revised Codes of Montana, Title 11, Chapter 927, § 5039.24:

"The city or town council has power: to prevent and punish intoxication, fights, riots, loud noises, disorderly conduct, obscenity, and acts or conduct calculated to disturb the public peace, or which are offensive to public morals, within the city or town, and within three miles of the limits thereof."

Revised Statutes of Nebraska, Chapter 16, § 16-228:

"A city of the first class by ordinance may provide for the punishment of persons disturbing the peace and good order of the city by clamor and noise, by intoxication, drunkenness, fighting, or using obscene or profane language in the streets or other public places, or otherwise violating the public peace by indecent and disorderly conduct, or by lewd or lascivious behavior."

Nevada Revised Statutes, Chapter 203, Section 203.010:

"Disturbing the peace. Every person who shall maliciously and willfully disturb the peace or quiet of any neigh-

borhood or family by loud or unusual noises, or by tumultuous and offensive conduct, threatening, traducing, quarreling, challenging to fight, or fighting, shall be guilty of a misdemeanor."

New Hampshire Revised Statutes, Title LVIII, Chapter 570, Section 570:1:

"Brawls, etc. No person shall make a brawl, nor, in any street or other public place, be guilty of rude, indecent, or disorderly conduct, or insult or wantonly impede a person passing therein, or play therein at any game."

New Jersey Statutes Annotated, Title 2A, Chapter 169-3:

"Arrest of disorderly person without process. Whenever an offense is committed in his presence, any constable or police officer shall, and any other person may, apprehend without warrant or process any disorderly person, and take him before any magistrate of the county where apprehended."

New Mexico Statutes, Chapter 40A, Article 20-1:

"Disorderly conduct. Disorderly conduct consists of: a. engaging in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct which tends to disturb the peace; . . . c. maliciously disturbing, threatening or, in an insolent manner, intentionally touching any house occupied by any person."

New York Penal Law, Section 240.20:

"Disorderly conduct. A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof: 1. He engages in fighting or in violent, tumultuous or threatening behavior; or 2. he makes unreasonable noise; or 3. in a public place, he uses abusive or obscene language, or makes an obscene gesture; or 4. without lawful authority, he disturbs any lawful assembly or meeting of persons; or 5. he obstructs vehicular or pedestrian traffic;

or 6. he congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse; or 7. he creates a hazardous or physically offensive condition by any act which serves no legitimate purpose."

General Statutes of North Carolina, Chapter 14, Article 22, Section 14-132:

"Disorderly conduct in and injuries to public buildings. — If any person shall make any rude or riotous noise or be guilty of any disorderly conduct in or near any of the public buildings of the State, or of any county or municipality, or shall write or scribble on, mark, deface, besmear, or injure the walls of any of the public buildings of the State or of any county or municipality, of any statute or monument, or shall do or commit any nuisance in or near any public building of the State or of any county or municipality, he shall be guilty of a misdemeanor. . . ."

North Dakota Century Code, Title 12, Chapter 12-19-01:

"Injury to public peace — Misdemeanor. — Every person who willfully and wrongfully commits any act which grossly disturbs the public peace, although no punishment is expressly prescribed, is guilty of a misdemeanor."

Ohio Revised Code, Title 37, Chapter 3773.22:

"Prohibition against being found intoxicated. No person shall be found in a state of intoxication or, being intoxicated, shall disturb the peace and good order, or shall conduct himself in a disorderly manner. . . ."

Oklahoma Statutes, Title 11, Section 1004:

Grants power to towns to restrain and prohibit disorderly conduct. In 1968, Title 21, Section 1362 was amended making it a misdemeanor "if any person shall willfully or maliciously disturb, either by day or night, the peace and quiet of any city of the first class, town, village, neighborhood or family by loud or unusual noise, or by abusive, violent, obscene or profane language, whether

addressed to the party so disturbed or some other person, . . ."

Oregon Revised Statutes 166.060:

Defines those guilty of vagrancy as "(f) any person who conducts himself in a . . . disorderly manner . . . in a public place or upon any public highway . . . or place whereby the peace or quiet of the neighborhood or vicinity may be disturbed."

Pennsylvania Statutes, Title 18, Section 4406:

"Whoever wilfully makes or causes to be made any loud, boisterous and unseemly noise or disturbance to the annoyance of the peaceable residents near by, or near to any public highway, road, street, lane, alley, park, square, or common, whereby the public peace is broken or disturbed or the traveling public annoyed, is guilty of the offense of disorderly conduct . . ."

Laws of Puerto Rico, Title 33, Section 1439:

"Every person who maliciously and wilfully disturbs the peace or quiet of any neighborhood or person, by . . . offensive conduct, is guilty of a misdemeanor . . ."

Rhode Island, Title 11, Chapter 45-1:

"Vagrants and Disorderly persons—: . . . every . . . disorderly person, shall be imprisoned . . ."

South Carolina, Title 16, Section 558:

"Public disorderly conduct or shooting, etc. — Any person who shall (a) be found . . . conducting himself in a disorderly or boisterous manner, . . . shall be guilty of a misdemeanor . . ."

South Dakota, Title 22, Chapter 22-13-5:

"Disorderliness or intoxication in unincorporated town. Any person guilty of disorderly conduct . . . arising from

drunkenness or otherwise, shall upon arrest . . ." Additionally Chapt. 22-16-33 makes homicide justifiable "when necessarily committed in attempting by lawful ways and means . . . in lawfully keeping and preserving the peace."

Tennessee Code, Title 39, Section 39-1213:

"Disorderly conduct declared a misdemeanor — Definition — Penalty. — It shall be a misdemeanor for any person to engage in disorderly conduct, which is defined as the use of rude, boisterous, offensive, obscene or blasphemous language in any public place; or to make or to countenance or assist in making any improper noise, disturbance, breach of the peace, or diversion, or to conduct oneself in a disorderly manner, in any place to the annoyance of other persons."

Texas Penal Code, Title 9, Art. 474: Disorderly Conduct, Section 1:

"No person, acting alone or in concert with others, may engage in disorderly conduct. Disorderly conduct consists of any of the following: . . . (2) interfering with the peaceful and lawful conduct of persons in or about their homes or public places under circumstances in which such conduct tends to cause or provoke a disturbance; or . . . (5) in a public or private place engages in violent, abusive, indecent, profane, boisterous, unreasonably loud, or otherwise disorderly conduct under circumstances in which such conduct tends to cause or provoke a disturbance; or . . ."

Utah Code, Title 76, Chap. 43-3:

Defines "Public nuisance" as a crime against the order and economy of the state, and consists in unlawfully doing any act, or omitting any act, or omitting to perform any duty, which act or omission either: "(1) Annoys, . . . the comfort, . . . of three or more persons; or, (2) offends public decency; or, (3) unlawfully interferes with, obstructs or tends to obstruct, . . . any street or highway . . ."

Vermont, Title 13, Section 1021:

Breach of the peace generally — A person who disturbs or breaks the public peace: "... (2) By any disorderly act or language, which does not amount to assault or battery, or destruction of property, shall be ..."

Virgin Islands, Title 14, Section 622:

Disturbing the peace; ... "Whoever maliciously and willfully — (1) disturbs the peace or quiet of any village, town, neighborhood or person, by loud or unusual noise, or by tumultuous offensive conduct, ... or (2) on the public streets, or upon the public highways, ... uses any vulgar ... language in a loud and boisterous manner — shall be ..."

Virginia, Effective April 2, 1968, repealed existing statutes and enacted Title 18.1, Section 254.01 through 254.11 pertaining to Riots, Routs and Unlawful Assemblies; Disorderly Conduct. Unlawful assembly as used in this article is defined (18.1-254.1(c)):

"... whenever three or more persons assemble without authority of law and for the purpose of ... exciting public alarm or disorder, such assembly is an unlawful assembly." 18.1-254.4 provides that every person except public officers and persons assisting them, who remain present at an unlawful assembly after having been lawfully warned to disperse, shall be guilty of a misdemeanor.

Washington Code 9.87.010:

Vagrancy classifies as a vagrant every "... (7) lewd, disorderly or dissolute person; or ..." The Supreme Court of Washington defined "disorderly" as contrary to rules of good order and behavior; violative of the public peace or good order; turbulent, riotous, or indecent. *State v. Levin*, 67 WN 2d 988, 410 P. 2d 901 (1966).

West Virginia Code, Section 61-6-1:

Prior to the 1969 amendment provided that it was the duty of *Judges* and *justices* to suppress riots, routs and unlawful assemblages within their jurisdictions and "to go among, or as near as may be with safety, to persons riotously, tumultuously, or unlawfully assembled, and in the name of the law command them to disperse; and if they shall not thereupon immediately and peaceably disperse, such judge or justice giving the command, and any other present, shall command the assistance of all persons present, and of the sheriff of the county, with his posse if need be, in arresting and securing those so assembled . . ." In 1969 judges and justices were relieved of this duty by the legislature and members of the department of public safety, sheriff and mayor were entrusted with this assignment.

Wisconsin, Chapter 947.01 disorderly conduct:

"Whoever does any of the following . . . (1) In a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud, or otherwise disorderly conduct under circumstances in which such conduct tends to cause or provoke a disturbance; or . . ." (see page 34, this Brief re consideration of this statute in *Zwicker v. Boll*, 391, U.S. 353 (1968)).

Wyoming, Title 6, Section 6-114, Breach of the Peace:

"Whoever by any loud or unnecessary talking, holloeing, or by any threatening, abusive, profane or obscene language, or violent actions, or by any other rude behavior, intercepts or disturbs the peace of any community in this state or of any of the inhabitants thereof, shall be guilty of a breach of the peace and upon conviction . . ."

AMERICAN LAW INSTITUTE
MODEL PENAL CODE

Offenses Against Public Order and
Decency

Article 250. Riot, Disorderly Conduct,
and Related Offenses

Section 250.1. Riot; Failure to Disperse.

(1) *Riot.* A person is guilty of riot, a felony of the third degree, if he participates with [two] or more others in a course of disorderly conduct:

(a) with purpose to commit or facilitate the commission of a felony or misdemeanor;

(b) with purpose to prevent or coerce official action; or

(c) when the actor or any other participant to the knowledge of the actor uses or plans to use a firearm or other deadly weapon.

(2) *Failure of Disorderly Persons to Disperse Upon Official Order.* Where [three] or more persons are participating in a course of disorderly conduct likely to cause substantial harm or serious inconvenience, annoyance or alarm, a peace officer or other public servant engaged in executing or enforcing the law may order the participants and others in the immediate vicinity to disperse. A person who refuses or knowingly fails to obey such an order commits a misdemeanor.

Section 250.2. Disorderly Conduct.

(1) *Offense Defined.* A person is guilty of disorderly conduct if, with purpose to cause public inconvenience annoyance or alarm, or recklessly creating a risk thereof, he:

(a) engages in fighting or threatening, or in violent or tumultuous behavior; or

(b) makes unreasonable noise or offensively coarse utterance, gesture or display, or addresses abusive language to any person present; or

(c) creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor.

"Public" means affecting or likely to affect persons in a place to which the public or a substantial group has access; among the places included are highways, transport facilities, schools, prisons, apartment houses, places of business or amusement, or any neighborhood.

(2) *Grading.* An offense under this section is a petty misdemeanor if the actor's purpose is to cause substantial harm or serious inconvenience, or if he persists in disorderly conduct after reasonable warning or request to desist. Otherwise disorderly conduct is a violation.

Section 250.7. Obstructing Highways and Other Public Passages.

(1) A person, who, having no legal privilege to do so, purposely or recklessly obstructs any highway or other public passage, whether alone or with others, commits a violation, or, in case he persists after warning by a law officer, a petty misdemeanor. "Obstructs" means renders impassable without unreasonable inconvenience or hazard. No person shall be deemed guilty or recklessly obstructing in violation of this Subsection solely because of a gathering of persons to hear him speak or otherwise communicate, or solely because of being a member of such a gathering.

(2) A person in a gathering commits a violation if he refuses to obey a reasonable official request or order to move:

(a) to prevent obstruction of a highway or other public passage; or

(b) to maintain public safety by dispersing those gathered in dangerous proximity to a fire or other hazard.

An order to move, addressed to a person whose speech or other lawful behavior attracts an obstructing audience, shall not be deemed reasonable if the obstruction can be readily remedied by police control of the size or location of the gathering.

The first of these is the fact that the
country is a very fertile one, and
the soil is very rich. The second is
the fact that the climate is very
pleasant, and the third is the fact
that the people are very friendly
and hospitable.

The fourth is the fact that the
country is very large, and the fifth
is the fact that the country is very
beautiful. The sixth is the fact
that the country is very healthy, and
the seventh is the fact that the
country is very safe.

The eighth is the fact that the
country is very cheap, and the ninth
is the fact that the country is very
easy to visit. The tenth is the fact
that the country is very interesting,
and the eleventh is the fact that
the country is very good.

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SUPREME COURT OF THE UNITED STATES

No. 729.—OCTOBER TERM, 1969

Donald Bachellar et al., Petitioners, v. State of Maryland.	}	On Writ of Certiorari to the Court of Special Appeals of Maryland.
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[April 20, 1970]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

A jury in Baltimore City Criminal Court convicted petitioners of violating Md. Code Ann., Art. 27, § 123 (1967),¹ which prohibits "acting in a disorderly manner to the disturbance of the public peace, upon any public street . . . in any [Maryland] city" ² The prosecution arose out of a demonstration protesting the Vietnam War which was staged between 3 and shortly after 5 o'clock on the afternoon of March 28, 1966, in front of a United States Army recruiting station located on a downtown Baltimore street. The Maryland Court of Special Appeals rejected petitioners' contention that their conduct was constitutionally protected under the First and Fourteenth Amendments and affirmed their convictions. 3 Md. App. 626, 240 A. 2d 623 (1968). The Court of Appeals of Maryland denied certiorari

¹ The trial in the Criminal Court was *de novo* upon appeal from a conviction in the Municipal Court of Baltimore. The Criminal Court judge sentenced each petitioner to 60 days in jail and a \$50 fine.

² The statute was amended in 1968 but without change in the operative language involved in this case. See Md. Code Ann., Art. 27, § 123 (c) (1969 Supp.).

in an unreported order. We granted certiorari, 396 U. S. 816 (1969). We reverse.

The trial judge instructed the jury that there were alternative grounds upon which petitioners might be found guilty of violating § 123. The judge charged, first, that a guilty verdict might be returned if the jury found that petitioners had engaged in "the doing or saying or both of that which offends, disturbs, incites or tends to incite a number of people gathered in the same area." The judge also told the jury that "[a] refusal to obey a policeman's command to move on when not to do so may endanger the public peace, may amount to disorderly conduct."³ So instructed, the jury re-

³ Both elements of the instruction were based on the Maryland Court of Appeals' construction of § 123 in *Drews v. Maryland*, 224 Md. 186, 192, 167 A. 2d 341, 343-344 (1961), vacated and remanded on other grounds, 378 U. S. 547 (1964), reaffirmed on remand, 236 Md. 349, 204 A. 2d 64 (1964), appeal dismissed and cert. denied, 381 U. S. 421 (1965). The instruction was "that disorderly conduct is the doing or saying or both of that which offends, disturbs, incites or tends to incite a number of people gathered in the same area. It is conduct of such nature as to affect the peace and quiet of persons who may witness it and who may be disturbed or provoked to resentment because of it. A refusal to obey a policeman's command to move on when not to do so may endanger the public peace, may amount to disorderly conduct."

The trial judge refused to grant petitioners' request that the jury be charged to disregard any anger of onlookers that arose from their disagreement with petitioners' expressed views about Vietnam. For example, the judge refused to instruct the jury that "if the only threat of public disturbance arising from the actions of these defendants was a threat that arose from the anger of others who were made angry by their disagreement with the defendants' expressed views concerning Viet Nam, or American involvement in Viet Nam, you must acquit these defendants. And if you have a reasonable doubt whether the anger of those other persons was occasioned by their disagreement with defendants' views on Viet Nam, rather than by the conduct of defendants in sitting or staying on the street, you must acquit these defendants."

turned a general verdict of guilty against each of the petitioners.

Since petitioners argue that their conduct was constitutionally protected, we have examined the record for ourselves. When "a claim of constitutionally protected right is involved, it 'remains our duty . . . to make an independent examination of the whole record.'" *Cox v. Louisiana (I)*, 379 U. S. 536, 545 n. 8 (1965). We shall discuss first the factual situation that existed until shortly before 5 o'clock on the afternoon of the demonstration, since the pattern of events changed after that time. There is general agreement regarding the nature of the events during the initial period.

Baltimore law enforcement authorities had advance notice of the demonstration, and a dozen or more police officers and some United States marshals were on hand when approximately 15 protesters began peacefully to march in a circle on the sidewalk in front of the station. The marchers carried or wore signs bearing such legends as: "Peasant Emancipation, Not Escalation," "Make Love not War," "Stop in the Name of Love," and "Why are We in Viet Nam?" The number of protesters increased to between 30 and 40 before the demonstration ended. A crowd of onlookers gathered nearby and across the street. From time to time some of the petitioners and other marchers left the circle and distributed leaflets among and talked to persons in the crowd. The lieutenant in charge of the police detail testified that he "overheard" some of the marchers debate with members of the crowd about "the Viet Cong situation," and that a few in the crowd resented the protest; "[o]ne particular one objected very much to receiving the circular." However, the lieutenant did not think that the situation constituted a disturbance of the peace. He testified that "[a]s long as the peace was not disturbed I wasn't doing anything about it."

Clearly the wording of the placards was not within that small class of "fighting words" which, under *Chaplinsky v. New Hampshire*, 315 U. S. 568, 574 (1942), are "likely to provoke the average person to retaliation, and thereby cause a breach of the peace," nor is there any evidence that the demonstrators' remarks to the crowd constituted "fighting words." Any shock effect caused by the placards, remarks, and peaceful marching must be attributed to the content of the ideas being expressed, or to the onlookers' dislike of demonstrations as a means of expressing dissent. But "[i]t is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers," *Street v. New York*, 394 U. S. 576, 592 (1969); see also *Cox v. Louisiana (I)*, *supra*; *Edwards v. South Carolina*, 372 U. S. 229 (1963); *Terminiello v. Chicago*, 337 U. S. 1 (1949), or simply because bystanders object to peaceful and orderly demonstrations. Plainly nothing that occurred during this period could constitutionally be the grounds for conviction under § 123. Indeed, the State makes no claim that § 123 was violated then.

We turn now to the events which occurred shortly before and after 5 o'clock. The petitioners had left the marchers after half past 3 to enter the recruiting station. There they had attempted to persuade the sergeant in charge to permit them to display their antiwar materials in the station or in its window fronting on the sidewalk. The sergeant had told them that Army regulations forbade him to grant such permission. The six thereupon staged a sit-in on chairs and a couch in the station.⁴ A few minutes before 5 o'clock the sergeant asked them

⁴ Petitioners' conduct in the station is not at issue in this case, since the State did not prosecute them for their conduct in that place.

to leave, as he wanted to close the station for the day. When petitioners refused, the sergeant called on United States marshals who were present in the station to remove them. After deputizing several police officers to help, the marshals undertook to eject the petitioners.⁵

There is irreconcilable conflict in the evidence as to what next occurred. The prosecution's witnesses testified that the marshals and the police officers "escorted" the petitioners outside, and that the petitioners thereupon sat or lay down, "blocking free passage of the sidewalk." The police lieutenant in charge stated that he then took over and three times ordered the petitioners to get up and leave. He testified that when they remained sitting or lying down, he had each of them picked up bodily and removed to a patrol wagon. In sharp contrast, defense witnesses said that each petitioner was thrown bodily out the door of the station and landed on his back, that petitioners were not positioned so as to block the sidewalk completely, and that no police command was given to them to move away; rather, on the contrary, that as some of them struggled to get to their feet, they were held down by the police officers until they were picked up and thrown into the patrol wagon. The evidence is clear, however, that while petitioners were on the sidewalk, they began to sing "We Shall Overcome" and that they were surrounded by other demonstrators carrying antiwar placards. Thus, petitioners remained obvious participants in the demonstration even after their expulsion from the recruiting station.⁶

⁵ The local police officers were deputized as marshals because their local police powers did not extend to the federally operated recruiting station.

⁶ The defense evidence indicated that petitioners were on the sidewalk after their removal from the recruiting station for only five minutes. A prosecution witness testified that they were there for 15 or 20 minutes.

A crowd of 50-150 people, including the demonstrators, was in the area during this period.

The reaction of the onlookers to these events was substantially the same as that to the earlier events of the afternoon. The police lieutenant added only that two uniformed marines in the crowd appeared angry and that a few other bystanders "were debating back and forth about Bomb Hanoi and different things and I had to be out there to protect these people because they wouldn't leave." Earlier too, however, some of the crowd had taken exception to the petitioners' protest against the Vietnam war.

On this evidence, in light of the instructions given by the trial judge, the jury could have rested its verdict on any of a number of grounds. The jurors may have found that petitioners refused "to obey a policeman's command to move on when not to do so [might have endangered] the public peace." Or they may have relied on a finding that petitioners deliberately obstructed the sidewalk, thus offending, disturbing and inciting the bystanders.⁷ Or the jurors may have credited petitioners' testimony that they were thrown to the sidewalk by the police and held there, and yet still have found them guilty of violating § 123 because their anti-Vietnam protest amounted to "the doing or saying . . . of that which offends, disturbs, incites, or tends to incite a number of people gathered in the same area." Thus, on this record, we find that petitioners may have been found

⁷ Maryland states in its brief, at 41-42, that "[o]bstrucing the sidewalk had the legal effect under these circumstances of not only constituting a violation of . . . § 123 . . . but also of Article 27, § 121 of the Maryland Code, obstructing free passage." Had the State wished to ensure a jury finding on the obstruction question, it could have prosecuted petitioners under § 121, which specifically punishes "[a]ny person who shall wilfully obstruct or hinder the free passage of persons passing along or by any public street or highway"

guilty of violating § 123 simply because they advocated unpopular ideas. Since conviction on this ground would violate the Constitution, it is our duty to set aside petitioners' convictions.

Stromberg v. California, 283 U. S. 359 (1931), is the controlling authority. There the jury returned a general verdict of guilty against an appellant charged under a California statute making it an offense publicly to display a red flag (a) "as a sign, symbol or emblem of opposition to organized government," (b) "as an invitation or stimulus to anarchistic action," or (c) "as an aid to propaganda that is of a seditious character." This Court held that clause (a) was unconstitutional as possibly punishing peaceful and orderly opposition to government by legal means and within constitutional limitations. The Court held that, even though the other two statutory grounds were severable and constitutional, the conviction had to be reversed, because the verdict "did not specify the ground upon which it rested. As there were three purposes set forth in the statute, and the jury were instructed that their verdict might be given with respect to any one of them, independently considered, it is impossible to say under which clause of the statute the conviction was obtained. If any one of these clauses, which the state court has held to be separable, was invalid, it cannot be determined upon this record that the appellant was not convicted under that clause [T]he necessary conclusion from the manner in which the case was sent to the jury is that, if any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld." 283 U. S., at 368. See also *Williams v. North Carolina*, 317 U. S. 287 (1942); *Terminiello v. Chicago*, *supra*; *Yates v. United States*, 354 U. S. 298 (1957); *Street v. New York*, *supra*.

On this record, if the jury believed the State's evidence, petitioners' convictions could constitutionally have rested on a finding that they sat or lay across a public sidewalk with the intent of fully blocking passage along it, or that they refused to obey police commands to stop obstructing the sidewalk in this manner and move on. See, e. g., *Cox v. Louisiana (I)*, at 554-555; *Shuttlesworth v. Birmingham*, 382 U. S. 87, 90-91 (1965). It is impossible to say, however, that either of these grounds was the basis for the verdict. On the contrary, so far as we can tell, it is equally likely that the verdict resulted "merely because [petitioners' views about Vietnam were] themselves offensive to some of their hearers." *Street v. New York*, *supra*, at 592. Thus, since petitioners' convictions may have rested on an unconstitutional ground, they must be set aside.

The judgment of the Maryland Court of Special Appeals is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.